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No. 07-812

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IN THE

Supreme Court of the United States

CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

Petitioner,

v.

BERNARD BOGGS, as Administrator of the Estate of HILDA BOGGS, deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WEST VIRGINIA, WOOD COUNTY

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a litigant that forfeited state appellate review of a punitive damage award by failing to timely file post-trial motions, and then mooted the issue by paying the entire judgment in exchange for a satisfaction of judgment, may seek an advisory opinion from this Court as to whether the state court of last resort was required to review the punitive damage award to an unspecified greater extent.

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STATEMENT OF THE CASE

The Petitioner, Camden-Clark Memorial Hospital, acting through its agents and employees, caused the wrongful death of Hilda Boggs, a 51-year old schoolteacher from Parkersburg, West Virginia. Hilda Boggs had broken her ankle and been taken to Petitioner's hospital. While being prepared for ankle surgery in the operating room, Mrs. Boggs was overdosed with anesthesia. Audible alarms tracking her pulse and respiration were deliberately deactivated because they were, in the words of one agent of the Petitioner, "annoying." The overdose shut down Mrs. Boggs' heart and lungs, but this went unnoticed for at least five minutes. The first sign that the anesthesia had shut down Mrs. Boggs' heart and lungs came when she turned blue on the OR table. Hilda Boggs did not recover, and died on October 5th, 2001, from hypoxic encephalopathy.

A massive cover-up ensued. Medical records were altered or destroyed.[1] Attempts were made to corrupt witnesses while Mrs. Boggs still lay on the table.[2] A false anesthesia record was prepared after the fact, added to the chart and given to Mrs. Boggs' family. Records of clinical care were sequestered with the claims manager for the hospital, who concealed them unlawfully during

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1. *See* Order Granting Plaintiff's Renewed Motion for Sanctions and Motion for Attorneys Fees at ¶ 182 (App. 81-82).

2. *Id.* at, *e.g.*, ¶¶ 153-161 (App. 70-72). The attempt to "get a story together" in the aftermath of Mrs. Boggs' death was a part of Mr. Boggs' successful claim for fraudulent concealment and punitive damages.

discovery.[3] The Boggs family was lied to about the disastrous lack of competence and the reckless attentiveness shown by the Petitioner's personnel.

The case was filed, discovered and then tried to a jury in February and March of 2006. The jury found Camden-Clark and its agents and employees liable for wrongful death, survivorship, fraudulent concealment and the tort of outrage. The verdict was $6,545,000.00, including $3,000,000.00 in punitive damages against the hospital (versus $1,950,000.00 in compensatory damages). The total verdict was reduced by the amount of the anesthesiologist's pre-trial settlement,[4] increased by pre-judgment interest and reduced to a Judgment against the Petitioner on April 28th, 2006. A separate Judgment for attorney's fees and costs entered later, but is not at issue here.

The Petitioner failed to file timely post-trial motions.[5] Untimely post-trial motions were then filed and denied on or about August 31st, 2006, on the grounds of their lateness *and* because of their lack of merit.[6] Despite the tremendous pertinence of this fact, the Petitioner failed to disclose it to this Court in its Petition.

Civil appeals are discretionary in West Virginia and Petitioner accordingly filed a Petition for Appeal ("the

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3. *See id.* at ¶¶ 81-103, 182 (App. 36-48, 91-82).

4. The pre-trial settlement also wiped out a $1,500,000.00 punitive award against the anesthesiologist himself. *See* Order Denying Defendant's Motion for A New Trial and Motions to Alter or Amend the Judgment Order at ¶ 42 (App. 107-108).

5. *See id.* at ¶¶ 15-27 (App. 95-101).

6. *Id.* at, *e.g.* ¶ 53 (App. 111).

state petition") with the Supreme Court of Appeals of West Virginia on or about October 30th, 2006, and a successive, virtually identical state petition on or about February 23rd, 2007. Respondent filed detailed Responses. On May 10th, 2007 the Supreme Court of Appeals of West Virginia placed Petitioner's state petitions on its motion docket.

In West Virginia, placement of a petition on the Motion docket allows the Petitioner unopposed oral argument with the full Supreme Court of Appeals regarding the petition. Counsel for the Petitioner in fact appeared before the Supreme Court of Appeals and argued the petition orally before that court on September 19th, 2007, and was questioned for some time by the court as regards the merits of the petition, which was then taken under advisement.

The Supreme Court of Appeals then issued an Order refusing the state petitions. Petitioner subsequently paid the entire judgment, including the punitive award, in exchange for a satisfaction of judgment which it has since filed.[7] Despite the tremendous pertinence of the fact that it has paid the underlying Judgment and discharged it, Petitioner unaccountably omitted mention of that fact on its Petition for *Certiorari* .

On December 18th, 2007, Petitioner sought *certiorari* in this Court, claiming that the sole issue was whether the due process clause of the Fourteenth Amendment to the federal constitution required *de novo* appellate review of punitive damage awards in state appellate

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7. *See* Satisfaction of Judgment (App. 1-2).

courts. While Petitioner's material omissions from the Petition regarding the state procedural default and the payment of the judgment put the issue in a false light, even viewed as Petitioner would like, the issue is not one that is proper for the exercise of this Court's *certiorari* jurisdiction and the Respondent therefore asks that the Petition be REFUSED in all respects.

SUMMARY OF REASONS THE PETITION SHOULD BE DENIED

1. Because the Petitioner paid the entire underlying Judgment in exchange for a satisfaction of the same, the issue is moot in this case, and this Court is without jurisdiction to hear the Petition. *See DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

2. Because the Petitioner procedurally defaulted the appealed issue under state law, this Court is without jurisdiction to decide the proposed issue. *See Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

3. Because the proposed issue involves no split among the federal circuits, nor any credible claim that an incorrect rule of law was applied, this case is not an appropriate one for this Court's *certiorari* jurisdiction.

4. Because the Petitioner has not shown it did not receive all the review to which it would be entitled even had it not defaulted the issue, the Petition is without merit.

5. Because the Petitioner is in effect asking this Court to render an advisory opinion requiring the West Virginia Supreme Court of Appeals to render further advisory opinions, the Petition is without merit and would represent a double departure from long-established rules for the state and federal judiciary.

I. Because the Petitioner paid the entire underlying Judgment in exchange for a satisfaction of the same, the issue is moot in this case, and this Court is without jurisdiction to hear the Petition.

The Constitution of the United States provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[8]

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8. U.S. Const. Art. III; *see also Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 175-79 (1803) (holding that even jurisdiction expressly conferred by Congress invalid where it transgresses the bounds of jurisdiction set forth in the Constitution).

From this constitutional language the doctrine of mootness, or lack of a "case or controversy," has been derived. This Court has explained the limitation of this doctrine on the power of federal courts:

> The starting point for analysis is the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). The inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964); see also *Powell v. McCormack*, 395 U.S. 486, 496 n. 7, 89 S.Ct. 1944, 1950, 23 L.Ed.2d 491 (1969); *Sibron v. New York*, 392 U.S. 40, 50 n. 8, 88 S.Ct. 1889, 1896, 20 L.Ed.2d 917 (1968).[9]

Since the Judgment about which the Petitioner has complained has been paid and satisfied, there is no "case or controversy" here. This Court has explained the effect of payment and satisfaction of a final judgment, stating, "an individual controversy is rendered moot, in the strict Art. III sense, by payment and satisfaction of a final judgment.[10]

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9. *See DeFunis* at 316; *see also* U.S. Const. Art. III.

10. *See United States Parole Com. v. Geraghty*, 445 U.S. 388, 400, 100 S.Ct. 1202, 1211, 63 L.Ed.2d. 479, 493 (1980).

In this case, the issues presented by Petitioner have been rendered moot by payment of the underlying judgment by Petitioner and by recordation of the satisfaction with the Wood County Circuit Clerk in Wood County, West Virginia. On or about October 4th, 2007, Petitioner paid the underlying judgment. On or about October 5th, 2007, Respondent served upon Petitioner a Satisfaction of Judgment. On December 18th, 2007, Petitioner filed the instant Petition. Finally, on January 25th, 2008, Petitioner filed with the Wood County Circuit Clerk in Wood County, West Virginia, the Satisfaction of Judgment issued by the Respondent.[11]

Through payment of the judgment and recording of the satisfaction of judgment, any issues related to the present Petition have been rendered moot, in accordance with *DeFunis* and *Geraghty*, *supra*. Furthermore, given the extremely specific factual circumstances involved in this case, it is beyond unlikely that Petitioner would encounter the identical issues as it faced in this matter again. Of course, had Petitioner moved for a stay pending petition for *certiorari* , as permitted under West Virginia Rule of Appellate Procedure 25(b), it could have protected its purported issue from mootness. It simply failed to do so, preferring to pay and avoid the burden of post-judgment interest running at ten percent. This matter has therefore been rendered moot by the actions of Petitioner and this Court is without Article III power to grant Petitioner's requested relief.

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11. *See* Satisfaction of Judgment (App. 1-2).

II. Because the Petitioner procedurally defaulted the proposed issue under state law, this Court is likewise without jurisdiction to decide the purported issue.

It is not mootness alone that deprives this Court of jurisdiction herein, as the decision below rests upon independent and adequate state law grounds.[12] This Court has long held that it does not have jurisdiction and will not grant *certiorari* to review a state court decision if that state court decision rests on an adequate and independent state ground.[13] Even where multiple grounds, including federal and nonfederal grounds, are stated to justify a state court decision, this court has indicated it does not have jurisdiction and will not grant *certiorari*, where the nonfederal ground is independent of the federal ground and adequate to support the judgment and the state court's opinion indicates clearly and expresses that the state ground is an alternative holding.[14] Finally, this Court had indicated that adequate

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12. The Petitioner is thus not only out of the basepath, he's been tagged out as well.

13. *See, e.g., Michigan v. Long, supra, Coleman v. Thompson, supra; Fox Film Corporation v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).

14. *See Mueller*, at 210, wherein this Court stated:

> The case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other is nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment.

(Cont'd)

state law grounds may either be substantive or procedural.[15]

In this case, the Petitioner failed to timely file its post-trial motions at the trial court level.[16] Petitioner failed to comply with the West Virginia Rules of Civil Procedure and the precedents of the Supreme Court of Appeals with regard to the preservation of trial court errors, including

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See, also, Sochor v. Florida, 504 U.S. 527 (1992), at 533, wherein this Court stated:

> This argument faces a hurdle, however, in the rule that this Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground, see *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-463, 89 L.Ed. 789 (1945), as it will if the state court's opinion "indicates clearly and expressly" that the state court ground is an alternative holding, see *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476, 77 L.Ed. 2d 1201 (1983).

15. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991), wherein this Court stated:

> The Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment [citation omitted]. This rule applies whether the state ground is substantive or procedural. *See, e.g., Fox Film, supra; Herndon v. Georgia*, 295 U.S. 441, 79 L.Ed. 1530, 55 S.Ct. 794 (1935). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional.

16. *See supra*, note 5.

challenging the size of a punitive damage award. No challenge to the fairness or legitimacy of these rules is made in the Petition. The Wood County Circuit Court initially made its determinations regarding Petitioner's post-trial motions on or about August 31st, 2006, and memorialized its decision setting forth reasons, in detail, why Petitioner's post-trial motions were denied in a Memorandum Opinion and Order Denying Defendant, Camden-Clark Memorial Hospital Corporation's Motions for a New Trial and to Alter or Amend the Judgment Order entered by the Wood County Circuit Court on October 26, 2006.[17]

As the Circuit Court of Wood County ruled, the post-trial motions of the Petitioner were untimely filed.[18] The timeline prescribed for the filing of such motions is mandatory and jurisdictional.[19] As a result of the untimely filing of Petitioner's post trial motions, under West Virginia law, the Circuit Court was without

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17. Unfortunately, Petitioner did not discuss the rulings issued in this Order or the ramifications of such Order in its Petition. In fact, it only made a passing reference to the issuance of this Order and did not attach the same to its Petition. Respondent asserts that this Order is determinative of the issues raised herein, and has attached this Order to this Reply at App. 91-113. The omission of the dispositive Order from Petitioner's appendix, and the evasion represented thereby, is a matter of some concern, in light of this litigant's long history of misstatements and material omissions to tribunals. *See supra*, note 8.

18. *See* Order denying Defendant's Motion for A New Trial And Motion to Alter or Amend the Judgment at ¶¶15-27 (App. 95-101).

19. *Id.* at ¶¶ 21-27 (App. 98-101).

jurisdiction to entertain the motions.[20] In addition, in accordance with the West Virginia Rules of Civil Procedure, Petitioner's failure to timely file its post-trial motions resulted in a waiver of all errors it could have assigned as grounds for its new trial motion, including any complaint about the size of the punitive award.[21]

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20. *Id.*

21. *See* W.Va.R.Civ.P. 59(f) which states, in pertinent part:

> If a party fails to make a timely motion for a new trial, after a trial by jury in which judgment as a matter of law has not been rendered by the court, the party is deemed to have waived all errors occurring during the trial which the party might have assigned as grounds in support of such motion...

This rule of waiver is not found in the corresponding FRCP 59. It is a creation solely of West Virginia jurisprudence. Furthermore, the West Virginia Supreme Court of Appeals has upheld the waiver of issues on appeal articulated in this rule in *Miller v. Triplett*, 203 W.Va. 351, 507 S.E.2d 714 (1998), wherein it stated:

> [Rule 59] does impose a penalty on the party who fails to make such a motion, that penalty being that the party is then 'deemed to have waived all errors occurring during the trial which [the party] might have assigned as grounds in support of such motion.' If the motion for a new trial or to alter or amend a judgment is [timely] made, however, no such grounds are deemed to have been waived, even if they are not specifically stated in the motion.
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> ...
>
> [A] Rule 59 motion for a new trial or to alter or amend a judgment is the only post-trial motion that permits the trial judge to consider errors that the judge is alleged to have committed during trial ... It can thus

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The underlying Judgment is therefore amply supported by state law grounds for purposes of *Long* and *Sochor*. As such, this Court is without jurisdiction to grant the Petition. Even assuming, *arguendo*, that the Supreme Court of Appeals *was* required to conduct a hearing to review the award of punitive damages in this case and to issue an opinion regarding the same, such requirements would only be applicable if the Petitioner had properly preserved the question of the size of the

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(Cont'd)

> also be argued that Rule 59(f) is an appropriate mechanism through which to encourage, if not require, litigants to bring such alleged errors first to the attention of the trial judge who they claim made them, thus giving the trial judge the first opportunity to address the alleged errors, decide if they actually were errors, determine if any errors need to be corrected, and, if so, decide upon the best way of doing so. This procedure also assures that the Supreme Court of Appeals has before it the most complete record possible relative to the alleged infirmities that it is being asked to remedy.
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> ...
>
> [A]s long as a motion for a new trial is timely filed, all errors occurring during the trial which were objected to at the trial are properly preserved even though not specifically identified in the motion for a new trial.
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> ...
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> We find therefore, if a party fails to make a timely motion for a new trial, Rule 59(f) of the West Virginia Rules of Civil Procedure bars consideration on appeal of alleged errors which occurred during the trial which a party might have assigned as grounds in support of a motion for new trial.

Id. at 355-356, 718-719.

award, in accordance with West Virginia law, at the trial court level. Because it did not, it cannot argue that the West Virginia Supreme Court of Appeals erred in denying its Petition for Appeal.

III. Because the proposed issue involves no split among the federal circuits, nor any credible claim that an incorrect rule of law was applied, this case is not an appropriate one for this Court's *certiorari* jurisdiction.[22]

While not an exclusive or exhaustive list of reasons as to why this Court would or would not grant a writ of *certiorari*, Rule 10 of the Rules of the United States Supreme Court sets forth the general considerations given to a review of a writ of *certiorari*:

> Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a

22. *See* Sup. Ct. R. 10.

> state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> **(b)** a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> **(c)** a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

In the instant case, Petitioner has not demonstrated any of the circumstances enumerated in Rule 10. First, the decisions in this case were made by a state trial court and a state supreme court. As such, Rule 10(a) is inapplicable. Second, because the West Virginia Supreme Court of was not required to reach Petitioner's defaulted

objections to the size of the punitive damage awards, the Petitioner has failed to demonstrate that the Supreme Court of Appeals has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. As such, Rule 10(b) is inapplicable. Finally, because the state courts based their rulings on procedural grounds rooted in West Virginia law, the Petitioner has failed to demonstrate that a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. As such, Rule 10(c) is inapplicable.

Given the failure of Petitioner to show any factual or legal circumstances that would involve a properly preserved and presented federal issue, this Court, in accordance with the considerations in Rule 10, should deny Petitioner's requested Writ of *Certiorari.*

IV. Because the Petitioner cannot show it did not receive all the review to which it would be entitled, even had it not defaulted the issue, the Petition is without merit. *See Garnes v. Fleming Landfill*, 186 W.Va. 656 (1991).

Petitioner argues in its brief that it is entitled to a *de novo* review of the punitive damage award in this case by the Supreme Court of Appeals. Notwithstanding the waiver and default that occurred by Petitioner's failure to properly preserve its rights to contest the size of the punitive damage award, and assuming, *arguendo*, that the Supreme Court of Appeals was required to review

the punitive damage award in this case, Petitioner has failed to demonstrate the Supreme Court of Appeals failed to conduct a *de novo* review of this matter, or that the process set forth by the Supreme Court of Appeals for review of punitive damage awards violates the due process clause of the Fourteenth Amendment or any of this Court's precedents regarding review of punitive damage claims.

Syllabus Point 5 of *Garnes v. Fleming Landfill*,[23] sets forth the standard for appellate review of punitive damage awards applied in West Virginia and states:

> 5. *Upon petition, this Court will review all punitive damages awards.* In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of errors related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.[24]

As this syllabus point states, the Supreme Court of Appeals conducts review of punitive damage awards at

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23. 186 W.Va. 656, 413 S.E.2d 897 (1991).

24. *Id.*, syl. pt. 5 (emphasis supplied). *Garnes* was issued after this Court's rulings in *Haslip* and the review system set up under *Garnes* was based, in part, on this Court's findings in *Haslip*.

the petition stage. Furthermore, the review that the Supreme Court of Appeals conducts in regard to punitive damages is a *de novo* review.[25]

a. Petitioner failed to summarize evidence presented to the jury or to the trial court at the post-judgment review stage regarding Syllabus Points 3 and 4 of *Garnes*.

As an initial matter, in order for the Supreme Court of Appeals to conduct a *de novo* review of any punitive damage award at the petition stage level, it is essential that it have the evidence necessary to conduct such a review. Thus, in accordance with its review, it requires a Petitioner who seeks to have a punitive damage award reviewed to summarize the evidence presented to the jury or to the trial court related to the factors enumerated in Syllabus Points 3 and 4 of *Garnes*. In addition, it is implied that a Petitioner may also submit additional evidence related to these factors in its filings since it requires a Petitioner to address each and every factor set forth in Syllabus Points 3 and 4 with particularity.

In this case, Petitioner failed to provide any significant evidence regarding these factors in either its initial Petition for Appeal[26] or in its Second Petition for

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25. *See Boyd v. Goffoli*, 216 W.Va. 552, 559-560, 608 S.E.2d 169, 176-177 (2004). *Boyd* was issued after this Court's rulings in *Cooper Industries* and *State Farm*.

26. *See* Petition for Appeal filed by Petitioner with the Supreme Court of Appeals at 66-70, wherein Petitioner made summary conclusions regarding each of the factors but failed to provide substantive evidence or argument regarding the same.

Appeal.[27] Since it did not provide the Supreme Court of Appeals with evidence, in particular, as to each point of Syllabus Points 3 and 4 of *Garnes*, pursuant to Syllabus Point 5 of *Garnes*, it waived any alleged errors with regard to the punitive damage award as a matter of state law.

b. The review conducted by the Supreme Court of Appeals is substantive.

In arguing at length that the *Garnes* review at the petition stage of West Virginia's appellate process is inadequate, Petitioner attempts to create an issue out of *Garnes* by ignoring what it says. Syllabus Point 5 of *Garnes* clearly states that the review of punitive damage awards done at the state petition stage is in fact substantive:

> *[W]e will consider* the same factors that we require the jury and the trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage.[28]

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27. *See* Second Petition for Appeal filed by Petitioner with Supreme Court of Appeals at 66-71, wherein Petitioner again made summary conclusions regarding each of the factors and challenged the analysis conducted by the trial court but failed to provide substantive evidence or argument to the Court regarding the same.

28. *See Garnes* at Syllabus Point 5 (emphasis supplied).

The "factors" are the same substantive factors required to be analyzed by the trial court in regard to punitive awards.[29] Accordingly, the import of *Garnes* is that the

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29. For purposes of convenience, Syllabus Points 3 and 4 of *Garnes* state:

> 3. When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the

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profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

4. When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant.

(Cont'd)

Supreme Court of Appeals has carved out an exception to the rule that the denial of a petition as to punitive damages expresses no view on the merits. Consideration of substantive evidence related to the factors enumerated in Syllabus Points 3 and 4 by the Supreme Court of Appeals is consideration of the substantive merits of punitive damage issues.[30] Thus, if a petition is denied by the Supreme Court of Appeals that addresses a *properly-preserved challenge* to a punitive damage award, a denial of the petition may be considered a decision on the merits of the punitive damage arguments made by the petitioner therein and an affirmance of the trial court's ruling regarding the same, as *Garnes* indicates clearly the review is done.

V. The Petitioner has already received significant procedural due process regarding the punitive damage award and has not shown that the outcome of this matter would be different if had received the "more exacting" review it seeks.

Petitioner in this case filed multiple briefs with the Supreme Court of Appeals, and was granted leave to file

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(Cont'd)

> However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

30. Notably, the cases cited by Petitioner on pages 17-18 of its Petition (*i.e. Triggs*, *Smith*, *In re National Bank of Wheeling*, and *Blackburn*) do not address punitive damage awards or review of such awards by the Supreme Court of Appeals. Further, Petitioner has not cited any case for the proposition it asserts that specifically deals with the review of punitive awards by the Supreme Court of Appeals.

briefs longer than normal multiple times. Petitioner was also granted an unopposed argument on the Supreme Court of Appeals' Motion Docket and a chance to argue its position before the full court. Essentially, Petitioner argues that this does not amount to "enough" procedural review of the punitive award from the Supreme Court of Appeals. But it is (intentionally, most likely) vague on what "more" it should have received. Does due process require a *fourth* brief on the issues to be filed? Or is due process offended when a litigant does not get to argue its case *twice* before the full Supreme Court of Appeals? Does due process of law require a detailed opinion regarding its petitions, despite the procedural defaults? How many pages of learned opinion would satisfy Petitioner (and more importantly, the Fourteenth Amendment) that the case was tried and lost, and that the issues appealed were defaulted in the post-trial process?

Respondent submits that Petitioner has received ample due process in the form of: a pleading stage, a discovery phase, a summary judgment phase, full trial by jury on the merits, post-trial review under the West Virginia Rules, 150 pages or more of appellate briefing, and unopposed oral presentation before its state's highest tribunal. This five year process is (to say the least) enough to satisfy both the fact and the appearance of due process.

VI. The relief that Petitioner seeks would require this Court to impose an amendment to the West Virginia constitution.

a. Because civil appeals may not be taken in West Virginia without an apparent error, pursuant to the state constitution, compelling the Supreme Court of Appeals to accept every case in which punitive damages are rendered would in effect amend the constitution of the state of West Virginia.

The West Virginia Constitution does not permit appeals as of right with respect to civil cases.[31] In order for the West Virginia Supreme Court of Appeals to consider an appeal, errors must be apparent in the record of the matter from the lower court.[32] If, as Petitioner argues, this Court were to require the Supreme Court of Appeals to grant every petition for appeal that involved the issue of punitive damages for the purposes of conducting a review of the same and issuing an opinion, this Court would be imposing an amendment to Article VIII, Section 4 of the West Virginia Constitution (or finding that provision unconstitutional). There is no need for such action, where, as here, the Supreme Court of Appeals has already said it reviews all punitive awards "at the petition stage."[33]

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31. *See* W.Va.Const. Art. VIII, Section 4, *supra*.

32. *Id.*

33. *See supra* note 27 and accompanying text and citations.

Unlike with lower federal courts, this Court does not have supervisory responsibility over state courts and may not require the observance of any special procedures except when necessary to assure compliance with the dictates of the Constitution.[34] This Court has never required that state supreme courts grant appeals as of right and to issue written opinions for purposes of reviewing punitive damage awards, and the Petitioner has not demonstrated that the process and procedure established by the Supreme Court of Appeals for conducting *de novo* reviews of punitive damage awards cannot satisfy the requirements of due process issued through this Court.

Furthermore, the Petitioner has not demonstrated that it has been substantively or procedurally harmed by the process established by the West Virginia Supreme Court of Appeals, within the confines of its own constitutionally mandated authority and the pronouncements of this Court, for the *de novo* review of punitive damage awards. In fact, the Petitioner did not even address in its Petition how the imposition of the punitive damage award in this case violated any protections guaranteed by the United States Constitution. Thus, the Petitioner has shown no reason why this Court should interfere with the process and procedure that has been established by the constitution, judiciary, legislature and the citizenry of the state of West Virginia for the review of appellate petitions.

Ultimately, the Supreme Court of Appeals has articulated a process and procedure for guaranteeing

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34. *See Harris v. Rivera*, 454 U.S. 339, 344-345, 102 S.Ct. 460, 464, 70 L.Ed.2d 530, 535 (1981).

protection for unconstitutional punitive awards in the appeal process, and it has exercised its constitutional responsibilities that with respect to this case. Accordingly, Petitioner's Writ should be refused.

b. The relief Petitioner seeks would require the issuance of advisory opinions in violation of West Virginia law.

As stated previously, Article VIII, Section 4 of the West Virginia Constitution does not permit the Supreme Court of Appeals to consider a petition for appeal unless it is satisfied upon review of the petition that there is probably error in the record.[35] Only after the Court grants consideration of a petition for appeal can it issue a written opinion.[36] Thus, a written opinion can only be issued by the Court once it determines there is legal error in the record that must be corrected.

The relief that Petitioner seeks would require the issuance of a written opinion in every case where punitive

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35. *See* W.Va. Const. Art. VIII, Section 4, *supra*.

36. *Id.* which states in pertinent part:

> When a judgment or order of another court is reversed, modified, or affirmed by the court, every point fairly arising upon the record shall be considered and decided; the reasons therefor shall be concisely stated in writing and preserved with the record; and it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case in which an opinion is written and in which a majority of the justices thereof concurred, which shall be prefixed to the published report of the case.

damages are awarded, regardless of whether there is legal error in the record or not. In those situations, as in here, where the Court does not determine that legal error appears within the record that must be corrected, issuance of a written opinion would not affect the judgment. Thus, as this Court has noted, where the judgment is not affected by issuance of a written opinion, such opinions are advisory in nature.[37] In *Coleman*, the Court went on to explain that it is not permitted to render an advisory opinion:

> In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126, 89 L.Ed. 789, 65 S.Ct. 459 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views on federal laws, our opinion could amount to nothing more than an advisory opinion.")[38]

In the same way that this Court is not empowered to issue advisory opinions, the Supreme Court is not

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37. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d. 640 (1991).

38. *Id.* at 729, 2554, 655-656.

authorized to issue advisory opinions, either.[39] As noted previously, the Supreme Court of Appeals is only authorized to issue opinions when it believes there is an apparent error in the record. Where there is no apparent error in the record, the Supreme Court of Appeals cannot issue a written opinion. If it did, that opinion would not affect the judgment rendered by the lower court and the court's opinion would amount to nothing more than an advisory opinion. Given that this Court will not issue advisory opinions and the Supreme Court of Appeals is not permitted to do so either, this Court should not compel the Supreme Court of Appeals to do that which this Court will not do in violation of the West Virginia Constitution and the Supreme Court of Appeals' own rulings.

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39. It is unlikely that this is a coincidence. *See, e.g., State ex rel. City of Charleston v. Coghill*, 156 W.Va., 877, 891, 207 S.E.2d 113, 122 (1973) ("this Court is not authorized to issue advisory opinions") and *Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W.Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943) ("Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes").

CONCLUSION

For all of the foregoing reasons, Petitioner's Writ should be refused.

Respectfully submitted,

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APPENDIX

APPENDIX A — SATISFACTION OF JUDGMENT IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA FILED JANUARY 25, 2008

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CIVIL ACTION NO. 03-C-296/623
Honorable C. J. Waters

BERNARD BOGGS, as administrator of the Estate of HILDA BOGGS, deceased, as personal representative of the statutory beneficiaries of the wrongful death claim herein asserted and in his own right,

Plaintiffs,

v.

CAMDEN-CLARK MEMORIAL HOSPITAL, CORP.,

Defendant.

SATISFACTION OF JUDGMENT

NOW COMES THE PLAINTIFF, Ray Boggs, by his counsel, Christopher J. Regan, and states that the Judgment entered in the above-captioned action on April 28th, 2006 has been SATISFIED, by the Defendant's payment of $5,528,781.56 on October the 4th, 2007. Plaintiff expressly reserves his right to prosecute the Judgment of May 24th, 2007, now the subject of Defendant's Petition for Appeal, when and if the same should become final.

Appendix A

Respectfully submitted,

BERNARD R. BOGGS, Plaintiff,

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APPENDIX B — ORDER GRANTING PLAINTIFF'S RENEWED MOTION FOR SANCTIONS AND MOTION FOR ATTORNEY'S FEES DATED MAY 24, 2007

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CIVIL ACTION NO. 03-C-296
Waters, C.J.

BERNARD BOGGS, as administrator of the Estate of HILDA BOGGS, deceased, as personal Representative of the statutory beneficiaries of the Wrongful death claim herein asserted and in his Own right,

Plaintiffs,

v.

CAMDEN-CLARK MEMORIAL HOSPITAL,

Defendant.

ORDER GRANTING PLAINTIFF'S RENEWED MOTION FOR SANCTIONS AND MOTION FOR ATTORNEY'S FEES

Presently pending before the Court is the nature of the Sanctions to be awarded pursuant to Plaintiff's Motion for Sanctions, previously GRANTED on December 19th, 2005, as well as Plaintiff's Renewed Motion for Sanctions and Motion for Attorney's Fees, argued on July 10th, 2006. Having considered the detailed

record in this matter, the briefs and legal authorities submitted by the parties, the testimony presented on the reasonableness of the fees and the oral argument of counsel, the Court is of the opinion that the Plaintiff's Renewed Motion for Sanctions and Motion for Attorney's Fees should be GRANTED in part, and that Plaintiff's attorney's fees and costs in civil actions 03-C-296 and 03-C-623 should be SHIFTED TO THE DEFENDANT, Camden-Clark Memorial Hospital. The Court's Findings of Fact and Conclusions of Law, as required by *Heldreth v. Rahimian*, 219 W.Va. 462, 637 S.E.2d 359, Feb 21, 2006 (W.Va. 2006) are as follows:

FINDINGS OF FACT

1. Plaintiff filed these consolidated civil actions against the Defendant and others in 2003, alleging negligence, wrongful death, fraud, spoliation of evidence, fraudulent concealment, the tort of outrage, negligent credentialing, and vicarious liability for certain of his claims. *See* Plaintiff's Complaints in Civil Actions 03-C-296 and 623, filed on June 30, 2003, and December 19, 2003, respectively.

2. The Defendant, Camden-Clark Memorial Hospital Corporation ("Camden-Clark"), denied the bulk of the allegations in each Complaint and following disposition of a number of procedural issues, the parties commenced discovery in late 2003 and early 2004.

3. On approximately September 20, 2005, Plaintiff filed a Motion for Sanctions pursuant to Rule 37 of the West Virginia Rules of Civil Procedure.

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4. A hearing was conducted on this Motion on December 19, 2005, and this Court granted Plaintiff's Motion. At that time, the Court noted that it would take the nature of the Sanction to impose against Camden-Clark, and/or its counsel, under advisement. In addition, this Court noted that it would review the extensive record of this case.

5. In March of 2006, the case was tried and the jury returned a verdict in this case favorable to Mr. Boggs.

6. On or about May 22, 2006, Plaintiff filed a Renewed Motion for Sanctions and Motion for Attorney's Fees for misconduct committed by Camden-Clark and its counsel throughout the course of this case. A hearing was conducted on this Motion on July 10, 2006. At that time this Court indicated it would take the issues presented under advisement.

7. Subsequent to the hearings of December 19, 2005, and July 10, 2006; after reviewing the complete record of this case; and after considering the briefs and arguments of counsel, this Court has determined that Camden-Clark, and its counsel, have committed multiple acts of litigation misconduct towards this Court and towards the Plaintiff.

8. The Court will address representative acts of misconduct in this Order together with the procedural and legal grounds it has considered in reaching its determinations.

Appendix B

I. Camden-Clark's Answers to Written Discovery

a. Plaintiff's First Set of Discovery Requests: Interrogatories

(i) Interrogatory Number Three

9. On June 7, 2004, the Plaintiff served his initial set of discovery requests upon Camden-Clark. Interrogatory Number Three stated as follows:

> State the full name and last known business and residence address and telephone number of every person known to you or your attorney who has knowledge of any discoverable matter with respect to the subject matter of this civil action and give a description of the information and/or knowledge possessed by such person.

See Plaintiff's First Set of Discovery Requests served on June 15, 2004.

10. Camden-Clark, stated in its answer to this interrogatory, filed on or about July 15, 2004:

> Discovery and investigation are in their most rudimentary stage and it is impossible to give a global answer to this interrogatory. At present, those persons with knowledge of any of the relevant facts and circumstances

> surrounding this case are identified in the medical records . . .

See Camden-Clark's Return to Plaintiff's First Set of Discovery Requests served on July 15, 2004.

11. Counsel for Camden-Clark signed these answers and the Risk Manager for Camden-Clark, Sherry Johnston ("Ms. Johnston") verified that these answers were true to the best of her knowledge. *Id.*

12. This discovery response served by Camden-Clark was erroneous and both its counsel, and its certifying representative Johnston, had reason to know this.

13. At the time these answers were served, Camden-Clark knew that at least the following persons had or could have discoverable knowledge regarding this case: Rebecca J. Hines, Roberta Howard, Cynthia Carpenter, Cynthia Kern, Ms. Johnston, Todd Kruger and Thomas Corder.

14. Documents in Camden-Clark's possession (in the form of notes, memoranda, interview summaries, and e-mails, among others) and subsequent depositions later verified that each of the individuals identified in Paragraph 20 had discoverable information and that Camden-Clark, its risk manager Johnston and its counsel, Richard Hayhurst, knew this.

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15. For example, Rebecca J. Hines ("Ms. Hines"), a nursing supervisor, had written a detailed email on the subject of Mrs. Boggs' aborted surgery. Crucially, the email from Ms. Hines revealed that Nurse Hines had instructed everyone in the operating room during Mrs. Boggs' aborted surgery to document what they had observed. Since Camden-Clark repeatedly denied that it possessed notes from the operating room personnel, a claim that later proved false, the omission of Ms. Hines' name and the concomitant failure to produce her email was highly material.

16. Additionally, perhaps the most egregious omission was that of Sherry Johnston herself. Ms. Johnston, the Hospital's own corporate representative, had interviewed at least eight key witnesses and possessed numerous documents critical to the facts of this case.[1] Moreover, Ms. Johnston had specifically instructed at least two witnesses to "throw away" or "destroy" notes, copies or documents, they had made regarding Mrs. Boggs' surgery and she had documented that she did this. This evidence was directly relevant to the Plaintiff's claims of fraudulent concealment and spoliation, but Ms. Johnston was not even identified as a person having knowledge of the matters, despite the fact that she herself verified the interrogatory answers,

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1. The documents included witness interviews, witness statements, contemporaneous notes from relevant personnel, emails regarding what happened to Mrs. Boggs, telephone logs, lists of CRNA privileges, information regarding the time indexes that disappeared from Mrs. Boggs EKG strips, variance histories for the doctors involved and other relevant materials.

referred to in Paragraphs 9 - 11 on behalf of Camden-Clark.

17. None of the individuals identified in Paragraph 13 are identified in the medical record of Mrs. Boggs, and Camden-Clark never supplemented its response to Plaintiff's interrogatory pursuant to Rule 26(e) of the West Virginia Rules of Civil Procedure. The full scope of these individuals' involvement in the case was only fully disclosed when the previously withheld documents were released to the Plaintiff by the Court on February 10, 2006. Plaintiff was significantly prejudiced by the failure of Camden-Clark to reply to the discovery, as he had not taken depositions of some of these individuals and had no opportunity to conduct further discovery based on the notes they had made in the scant days left before trial.[2]

(ii) Interrogatory Number Four

18. Interrogatory Number Four of Plaintiff's First Set of Discovery Requests stated as follows:

> Identify by name, residence and business address and residence and business telephone number, all individuals who participated in the care and treatment of Hilda Boggs while a patient at Camden-Clark Memorial Hospital Corporation and for each individual, identify

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2. The Court notes that discovery in this case was closed on January 6, 2006.

> their position, duties and shift(s) worked while Hilda Boggs was a patient at Camden-Clark Memorial Hospital Corporation and describe what was done by each of these individuals and when it was done and identify all documents which memorialize what was done by each such individual.

See Plaintiff's First Set of Discovery Requests served on June 15, 2004.

19. Camden-Clark, in its answer to this interrogatory, filed on or about July 15, 2004:

> Discovery and investigation are in their most rudimentary stage and it is impossible to give a global answer to this interrogatory. At present, those persons with knowledge of any of the relevant facts and circumstances surrounding this case are identified in the medical records, qv., and which are incorporated herein pursuant to Rule 33(d) and Rule 10(c) of the West Virginia Rules of Civil Procedure. The defendant acknowledges its obligations under Rule 26(e) of said Rules.

See Camden-Clark's Return to Plaintiff's First Set of Discovery Requests served on July 15, 2004.

20. As discussed at Paragraphs 13 - 17, *supra*, the representation that the medical records identify all of those persons with knowledge of any of the relevant facts and circumstances surrounding this case is erroneous.

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21. In addition, the representation that the medical record identifies all of the persons who participated in the care and treatment of Hilda Boggs is also erroneous.

22. At the very least, two individuals who participated in the care and treatment of Mrs. Boggs were not identified in the medical record of Mrs. Boggs.

23. First, Ms. Hines, nursing supervisor, participated in the resuscitation effort involving Mrs. Boggs. No documentation of her participation in these efforts is contained in the medical record of Mrs. Boggs.

24. Second, Bernice Burns ("Ms. Burns") also participated in the resuscitation effort involving Mrs. Boggs. Once again, no documentation in the medical record of Mrs. Boggs clearly demonstrates her participation in these efforts. Mrs. Burns was a crucial witness who later testified that she made notes about what happened to Mrs. Boggs and gave them to the hospital, but the notes were never produced by Camden-Clark.

25. In addition, the representation that Camden-Clark's investigation of the facts surrounding the events involving Mrs. Boggs was in 'their most rudimentary stage' was false. In fact, Camden-Clark had conducted such a comprehensive investigation by the time of the filing of Plaintiff 's Complaint, that Ms. Johnston's claim investigation file included hundreds of pages of documents, including, but not limited to:

a. Witness statements;

b. E-mails;

c. Interview summaries;

d. CRNA privilege reports;

e. Nurse's personal notes;

f. CRNA's personal notes;

g. Claims notices to insurers;

h. Variance histories for the doctors involved;

i. State agency investigations;

j. "Root Cause Analysis"; and

k. Letter from the treating cardiologist.

26. Finally, Camden-Clark's answer to this interrogatory was false in that it failed to identify the documents which memorialized what each of the persons who cared for and treated Mrs. Boggs did. As was later determined, at the time of the filing of this response, Camden-Clark had in its possession, which it failed to identify in its response to this interrogatory, at least the following documents:

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a. Interview summary for Anna Haney;

b. Interview summary for Sheila Sleeth;

c. Interview summary for Ms. Burns;

d. Interview summary for Ms. Hines;

e. Interview summary for Betsy Collins;

f. Interview summary for Charles Weddle;

g. Interview summary for Denise Humphries;

h. Handwritten statement of Sheila Sleeth;

i. Handwritten statement of Denise Humphries;

j. Handwritten statement of Charles Weddle;

k. Handwritten statement of Betsy Collins;

l. Written notes of Anna Haney;

m. Written notes of Evelyn Melvin;

n. E-mail from Ms. Hines; among others.

27. Finally, Camden-Clark asserted that it acknowledged its obligations under Rule 26(e) of the West Virginia Rules of Civil Procedure but it failed to ever supplement the answers it provided to Interrogatories Three or Four.

28. As discussed, herein, the identification of these witnesses and documents, just weeks before trial, provided crucial information to Plaintiff regarding his claims.

b. Plaintiff's First Set of Discovery Requests: Request for Production

29. As part of his requests for production, served on June 15, 2004, Plaintiff requested the following:

> *REQUEST NO. 16*: Please provide a copy of any written statements that were taken from anyone regarding the facts of this case.

See Plaintiff's First Set of Discovery Requests served on June 15, 2004.

30. In its answers, Camden-Clark made the following response:

> *RESPONSE*: Objection. Work product. Without waiver of the foregoing objection, no statement was taken from the plaintiff's decedent other than that which is reflected in

> the medical records, and no statement was taken from the plaintiff other than his deposition, q.v.

See Camden Clark's Return to Plaintiff's First Set of Discovery Requests served on July 15, 2004.

31. Camden-Clark's answer was simultaneously false and misleading, It was false, because Camden-Clark knew that it had taken numerous statements from witnesses as part of its investigation. It was misleading because Camden-Clark failed to disclose or file a proper privilege log regarding its purported work-product claims for the statements in its possession. Camden-Clark later claimed it had no statements and that nothing was being withheld pursuant to its objections. *See infra at* ¶¶ 116-17, 121, 123, 131-32, 135.

32. The identification and substance of witness statements and/or interview summaries by Camden-Clark were critical factors involved in this case.

33. For example, a written statement by Denise Humphries ("Ms. Humphries") exhaustively detailed the timeline of events in the operating room where the events involving Mrs. Boggs took place and Ms. Humphries' actions involving her care and treatment of Mrs. Boggs. *See* Handwritten. Statement of Ms. Humphries dated October 18, 2001. Ms. Humphries made no record of her actions involving Mrs. Boggs in the medical record produced to the Plaintiff by Camden-Clark, and Camden-Clark provided no further documentation to the Plaintiff regarding Ms. Humphries' actions.

34. In another example, a statement given by Anna Haney ("Ms. Haney") directly to Camden-Clark's Risk Manager, Ms. Johnston, revealed that Dr. Koyawala had attempted, in Ms. Haney's words, to "get a story together" with other physicians. *See* Interview of Anna Haney dated November 1, 2001.

35. In yet another example, a statement taken from circulating nurse Sheila Sleeth ("Ms. Sleeth") by Ms. Johnston confirmed that time indexes had disappeared from Mrs. Boggs' cardiac rhythm strips. *See* Interview of Sheila Sleeth dated October 11, 2001.

36. As will be discussed, *infra*, at Paragraphs 38 *et seq.*, Camden-Clark repeatedly failed, even after multiple orders of this court had issued, to timely submit these important documents for in camera review or to produce them to the Plaintiff.

37. The result of Camden-Clark's failure to fairly and fully respond to these written discovery requests was that factual information was denied to the Plaintiff to which he was lawfully entitled until just a few weeks before trial. By the time Plaintiff obtained information and documents to which he had been entitled for over one year, there was no time left to conduct discovery, depose witnesses, disclose additional experts or theories or to develop additional evidence based on what Plaintiff learned from the wrongfully withheld documents.

Appendix B

II. Camden-Clark's Serial Violations of Court Orders Regarding Discovery

a. Camden-Clark's Failure to Comply with Three Court Orders regarding Privilege Logs and/or Production of Documents

38. Plaintiff filed motions to compel complete answers to written discovery in this matter on several occasions. Hearings on Plaintiff's motions were held before each judge of this circuit, on December 20th, 2004; May 23rd, 2005; August 3rd, 2005; and December 19th 2005.

39. At each of the first three hearings, the circuit judge[3] ordered Camden-Clark to produce a privilege log, pursuant to West Virginia law, of the documents it was withholding from the Plaintiff pursuant to privilege claims. In the latter two of those three hearings, the Court's order provided that the documents also be submitted for *in camera* review and that if they were not, they should be produced to the Plaintiff.

40. At the first hearing on December 20, 2004, the Court instructed Camden-Clark to produce a privilege log within thirty (30) days regarding any documents that were responsive to Plaintiff's previously served discovery requests.

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3. The first hearing was held before Judge Hill in case 03-C-623; the second was held before Judge Reed in case 03-C-623 and the third and fourth were held before the undersigned Chief Judge in both case 03-C-623 and 0c-C-296. By previous order of this Court, all discovery taken in one case was held to be operative in the other.

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41. Following the December 20, 2004, hearing, Camden-Clark produced a 'bare-bones' privilege log with respect to the credentialing file of Manish I. Koyawala, M.D. However, it did not produce a privilege log with respect to any other documents it had in its possession that were responsive to Plaintiff's discovery requests. *See* Part I, *supra.*

42. At the second hearing on May 23rd, 2005, Plaintiff asked the Court to overrule all objections raised by Camden-Clark to production of documents that were not included in any previously filed or prepared privilege log and which were the subject of previously served discovery requests. The Court declined to do so, but granted Plaintiff's Motion to Compel and allowed Camden-Clark an additional ten (10) days to produce a log or a protective order motion justifying its non-production. Camden-Clark neither filed a log nor produced the documents to the Court. It simply ignored the Court's second Order regarding the subject documents.

43. At the third hearing on August 3rd, 2005, Plaintiff again asked the Court to overrule all objections raised by Camden-Clark to production of documents that were not included in any previously filed or prepared privilege log and which were the subject of previously served discovery requests and granted Motions to Compel. Once again, the Court declined to do so and gave Camden-Clark an additional seven (7) days to produce a log and provide the documents to the Court for in camera review. Once again, Camden-Clark neither produced a log nor

produced the documents for in camera review. Once again, Camden-Clark simply ignored the Court's third Order regarding the subject documents.

44. After failing to comply with the Court's third order regarding these issues, the Plaintiff, for the fourth time, moved to compel production of the previously undisclosed documents and for sanctions for failure to comply with this Court's prior Orders. Plaintiff 's Motion was heard on December 19th, 2005. At that time, the Court noted Camden-Clark's failure to comply with the prior Court Orders and GRANTED Plaintiff 's Motion for Sanctions, while taking the nature of the sanctions under advisement.

45. Moments before the hearing on December 19th, 2005, Camden-Clark produced to the Plaintiff and filed with this Court its second purported privilege log in this case. In addition, Camden-Clark also provided the Court with a large volume of documents in a banker's box with two expandable folders with nineteen individual file folders. Among these documents were dozens of critical documents about which no prior disclosure had been made, either to Plaintiff or the Court, despite the repeated orders. *See* Part I, ¶¶ 9-28, *supra.*

b. Camden-Clark's Failure to Comply with Legal Requirements for Production of Privilege Log pursuant to Court Order

46. Significantly, the privilege log submitted in December, 2005, after one year and three court orders had issued did not satisfy the criteria set forth by *State ex rel. Allstate Insurance Company v. Madden*, 215 W.Va. 705, 601 S.E.2d 25 (2004) and *State ex rel. Shroades v. Henry*, 187 W.Va. 723, 421 S.E. 2d 264 (1992) with respect to documents claimed to be privileged based on attorney-client/work-product or the medical peer review protections of *W.Va. Code* §30-3C-3. *See* Second Privilege Log filed by Camden-Clark on December 19, 2005. While the second privilege log does contain columns entitled Description of Document, Date of Document, Custodian, and Source of Document, it fails to include the reason for creation of the various documents identified. Furthermore, the log lists only a dozen or so items, when hundreds of pages of documents were withheld. Very few of the documents provided to the Court were specifically identified. Furthermore, Camden-Clark provided no justification for the documents in question being privileged other than boiler-plate assertions of attorney-client/work-product protections or peer review.

c. Camden-Clark's failure to comply with Court Orders after December 19, 2005.

47. Even after Camden-Clark's submissions and filings on December 19, 2005, it continued to withhold key evidence from the Plaintiff that was neither

specifically identified in any privilege log submitted to the Plaintiff, or to the Court nor provided to the Court for in camera review prior to the trial of this case.

48. For example, on the first day of trial, counsel for Camden-Clark produced four additional witness interview summaries prepared by Ms. Johnston. Those interview summaries included two of the most important fact witnesses in this case, Nurses Haney and Burns, as well as scrub tech Charles Weddle and Nurse Betsy Collins. These interview summaries were the subject of Plaintiff's prior discovery requests and the prior Orders of this Court regarding production of these documents and/or an appropriately prepared privilege log. Furthermore, these documents were, once again, in the possession of Ms. Johnston or Camden-Clark's counsel.

49. Three of the interview summaries provided key information to Plaintiff regarding certain aspects his claims, including destruction of documents, attempts to coordinate stories, falsification of medical records, and negligence. For example, Weddle's interview summary specifically recited that he was told to destroy his notes. Burns' statement stated that she repeatedly asked to have her notes returned to her from Sherry Johnston — notes Camden-Clark claimed did not exist. Nurse Haney's interview summary extensively corroborated her whistle-blowing testimony regarding Dr. Koyawala's attempt to "get a story together" and to tamper with the medical record. Virtually all of the withheld documentation of what happened to Mrs. Boggs in the OR supported Plaintiff's allegations of negligence in some manner.

50. None of these documents were identified in a privilege log; none were the subject of a pending protective order motion; none were provided to the Court for in camera review prior to the first day of trial; and none were produced to the Plaintiff pursuant to his discovery requests. Once again, Camden-Clark had failed to comply with this Court's Orders regarding discovery.

51. On the fourth day of trial, Camden-Clark produced a statement from Charlie Weddle, the day after the jury was told that the such notes had likely been destroyed by Camden-Clark, based on Camden-Clark's own internal document stating that Weddle was told to "get rid of" his copy of the notes and Camden-Clark's failure to produce any of its own original or copies of such notes during discovery of this case. *See* Interview Summary of Charles Weddle.

52. Once again, the statement referenced in Paragraph 51 were the subject of Plaintiff's previous discovery requests and this Court's three prior court Orders regarding such documents. However, once again, Camden-Clark failed to identify this document in any appropriately prepared privilege log, failed to seek a protective order for such notes, refused to produce such notes for in camera review, and refused to provide such notes to the Plaintiff prior to the fourth day of trial. Once again, Camden-Clark had failed to comply with this Court's Orders regarding discovery.

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53. Throughout all of these events related to Camden-Clark's failure to comply with this Court's Orders, at no time did Camden-Clark claim that it was entitled to defy the Court's Orders based on an 'open contention that no valid obligation existed. In fact, Camden-Clark, through its counsel, routinely promised to comply with this Court's Orders. *See* Transcript of December 20, 2004, hearing at 46; Transcript of May 23, 2005, hearing at 22; and Transcript of August 3, 2005, hearing at 31 – 33.

54. However, at the hearing on August 3, 2005, counsel for Camden-Clark asserted that any work performed by the custodian of most of these records, Ms. Johnston, including any documents she may have generated or assembled during her work on this case, would be protected by the work-product privilege. This Court found that Ms. Johnston's work would not be protected by the work-product privilege. Counsel for Camden-Clark asked for, and received a thirty (30) day stay of said Order to produce Ms. Johnston's file for the specific purpose of seeking appellate review of this Order in the Supreme Court of Appeals.

55. Camden-Clark never sought a writ during this thirty (30) day stay period or even within six (6) months of the August 3, 2005 Order.

56. Rather, Camden-Clark waited until February 21, 2006, seven days before trial and over six months after this Court granted the thirty day stay on August 3, 2005, to seek a writ regarding the release of certain of Ms.

Johnston's documents with the Supreme Court of Appeals.[4] After the stay expired in September of 2005, Camden-Clark did nothing to comply with this Court's Order of August 3rd until Plaintiff had again moved to compel and for sanctions and was heard on December 19th, 2005.

III. Camden-Clark Filed Inaccurate Legal Filings with this Court in Regard to the Court Orders it had Ignored and Disobeyed.

57. On February 10, 2006, this Court released certain documents to the Plaintiff that had been submitted by Camden-Clark for in camera review.

58. Based on this Court's review, Camden-Clark had not sufficiently established that some documents it had submitted were protected by attorney-client, work product, or medical peer review privilege. Other documents were found to be privileged and this Court withheld them from the Plaintiff. *See infra* at ¶67.

59. On February 15, 2006, Camden-Clark filed "Emergency Motions."

60. In its motion, Camden-Clark, through its counsel, represented to the Court as follows:

> b. The issue of how those documents would be handled was discussed before the Court on

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4. That writ was unanimously turned down by the West Virginia Supreme Court of Appeals on February 27, 2006.

> August 3, 2005, at which time, by agreement, Camden-Clark was granted a thirty-day stay of proceedings after the Court determined what documents were not subject to the attorney-client privilege, the doctrine of attorney work-product or the peer-review exemption from discovery and disclosure, to seek appellate relief with the Supreme Court of Appeals, if this Court determined to overrule any of Camden-Clark's claims to exemption from discovery and disclosure. *See* transcript of hearing of August 3, 2005, page 35.

See Emergency Motions by Defendant Camden-Clark Memorial Hospital Corporation at 10.

61. The representation made by Camden-Clark and its counsel in Paragraph 60 is inaccurate.

The pertinent sections of the August 3, 2005, hearing transcript states as follows:

> COURT: However, I do not believe work done by Ms. Johnston, a hospital employee, would be considered work product. Unless there's some other privilege, I don't think we've had a log submitted, have we Mr. Hayhurst?
>
> MR. HAYHURST: No. . . .
>
> . . .

MR. HAYHURST: The only other issue I think there was was I declined — it's the issue about her, Mrs. Johnston, testifying about the counterclaim, factual basis for the claim, and we're withdrawing the counterclaim without prejudice.

MR. REGAN: In any case, what Ms. Johnston knows about the factual basis for the counterclaim may lead to discoverable information in this case, so that doesn't take away the motion to compel. I'm not sure we can stop them from withdrawing a counterclaim, but we still want to know what the hospital believed its basis to be to sue Ray Boggs and allege he abused the court system or whatever the counterclaim specifies. We're not going to abandon discovery into that issue. Obviously, if somebody at Camden-Clark sat down and said, we've got reason to believe this lawsuit's frivolous and abusive to the court process, that's certainly pertinent to — certainly pertinent to Mr. Boggs' underlying —

MR. HAYHURST: I agree with that, but they have to do that by 30(b)(7) deposition rather than by selecting the attorney's investigator and attempting to make her disclose what the attorney knows.

MR REGAN: I think that's covered by the Court's ruling, though. She's not the investigator.

> MR. HAYHURST: He's not made that ruling yet.
>
> MR. REGAN: That's the third one I have written down, that the work done by Sherry Johnston is not work product.
>
> MR. HAYHURST: I don't think he's made that.
>
> THE COURT: I think so.
>
> MR. HAYHURST: Well, your Honor, I want a thirty day stay of that ruling so I can appeal that to the Supreme Court. That's too critical to us, to our method of operating, not to seek intermediate review. I don't know that I'll get it, but I want to seek it if the Court will allow me that time, the thirty days.
>
> MR. REGAN: I have no objection to them getting thirty days to pursue his rights.

See pages 24, 34-35 of August 3, 2005, hearing transcript. Moreover, this Court's Order specifically stated:

> The Court further ORDERED that the Hospital follow the above-described procedure [either submit for in camera review or produce to Plaintiff] as to any documents it contends are privileged which were identified specifically in the Motion to Compel or at the hearing,

> including but not limited to witness statements or interviews, however characterized, in the file of Sherry Johnston

See Order dated August 31st, 2006, at 3. That Order further stated:

> Counsel for the Hospital requested a 30 day stay of this Court's ruling in Plaintiff's favor and said stay is GRANTED, for the purpose of allowing the Hospital to pursue any relief from this Court's ORDER to which it may believe it is entitled.

Id. at 3-4. But Camden-Clark never took advantage of the stay, produced no documents until December 19th, 2005, withheld critical documents even after that date, and later claimed the Court had not yet ruled in Plaintiff 's favor and this was not true.

63. Furthermore, in its emergency motions, Camden-Clark represented to the Court as follows:

> c. On January 17, 2006, the Court announced that it intended to overrule Camden-Clark's objections to disclosure of witness statements but agreed to a request that it would disclose to the parties specifically what was being disclosed before disclosure to allow Camden-Clark to pursue its appellate/prohibition remedies, if needed.

See Emergency Motions by Defendant Camden-Clark Memorial Hospital Corporation at 10.

64. Once again, Camden-Clark's representation in Paragraph 60 is inaccurate.

65. This Court did not agree on January 17, 2006, that it would disclose to the parties specifically what documents were being disclosed before disclosure to allow Camden-Clark to pursue its appellate/prohibition remedies. At that point, five different hearings had taken place, four motions to compel had been granted, Camden-Clark had been given a stay and the matter was ripe for decision.

66. However, this Court did, in fact, disclose on January 17, 2006, what it intended to disclose to Plaintiff:

> . . . But I think things like witness statements, notes, hospital records, all that is disclosable. Some of these things you may already have, because some of it's even correspondence between the three lawyers that were involved when . . .[5]
>
> Then there's some things on standards, which I think anybody has access to, but I don't see how they would be privileged.[6]
>
> The area with Medicaid complaints, I would think that's from a governmental agency, so wouldn't that be . . .[7]

---

5. *See* August 3, 2005, hearing transcript at 63.

6. *Id.* At 63-64.

7. *Id.* At 66. Counsel for Camden-Clark concedes the State of West Virginia does not believe Medicaid complaints are quality improvement subject to protection by the peer-review exemption from disclosure. *Id.*

> Well, whatever's in the Haney notes I think is disclosable as a prior witness statement.[8] And then there's an incident report . . . So that would go.[9]

67. Furthermore, this Court disclosed on January 17, 2006, what it intended not to disclose:

> I determined that some is disclosable and some's not. There's obviously some that are attorney/client privilege, because there are letters back and forth between Mr. Hayhurst and his client. So, obviously that would not . . .[10]
>
> And, of course, credentialing files would be privileged. The actual peer review meeting, that would be privileged under peer review.[11]

68. Finally, with respect to the request to provide a pre-disclosure list of what this Court intended to disclose, the Court was clear that it did not intend to provide a pre-disclosure list:

> **MR. HAYHURST**: May I make a suggestion? Would you consider dictating a brief letter

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8. *Id.* At 69.

9. *Id.* At 71.

10. *Id.* At 63.

11. *Id.* At 64.

saying what you intend to release and then let me have a day to digest it to make sure that there's — that there's nothing — I don't think there's going to be anything I'd take exception to, but would you let me have just a day to look at it before they're released to the Plaintiff?

THE COURT: You don't want me to do the release or —

MR. HAYHURST: I'd like to have —

THE COURT: We'd have to keep a record, I guess. If we keep a record of what's not released, I guess that's what would be needed for any appeal in the future. Obviously, I at least have to keep copies of what's not released, but go ahead and release —

. . .

MR. HAYHURST: I think both — what you're going to release, I think both of us need copies, but I'd like, before the actual release, I'd like to have 24 hours to know what it is.

THE COURT: I don't think there's going to be anything earth-shattering, like the Gnegy letter.

> **MR. HAYHURST**: I don't think so either, your Honor.[12]

69. Finally, in its emergency motions, Camden-Clark represented to this Court:

> d. On February 10, 2006, without notifying counsel for Camden-Clark of its decision, this Court disgorged to counsel for the plaintiff certain documents that should never have been disclosed to the plaintiff . . .

See Emergency Motions by Defendant Camden-Clark Memorial Hospital Corporation at 10.

70. Once again, Camden-Clark's representations in Paragraph 69 are inaccurate.

71. As documented in Paragraph 66 – 68, this Court notified both parties what it intended to disclose at the hearing of January 17, 2006.

72. Camden-Clark's filings with respect to the release of certain documents by this Court on February 10, 2006, continued in Camden-Clark's Response to Plaintiff's Renewed Motion for Judgment by Default and Request for a Rule 55(b)(2) Hearing ("Camden-Clark's Response") filed on February 27, 2006.

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12. *Id.* At 65-66. As this excerpt shows, the Court made no agreement to provide a pre-disclosure letter of what it intended to release. Furthermore, Camden-Clark did not cite the Court's attention to any authority, and this Court is not aware of any authority, that would require the Court to dictate such a letter.

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73. In this filing, Camden-Clark stated, in pertinent part:

> Camden-Clark cannot by statute divulge the information accumulated by it through the peer review process . . .
>
> Furthermore, there is no case law in West Virginia to date which even contemplates that a trial court can engage in an in camera inspection of peer-review materials, since the provisions of the West Virginia Act do not make materials so generated 'privileged,' in the same sense as the attorney-client privilege or the work-product privilege . . . To the contrary, the materials, by statute, 'shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings or be admitted as evidence in any civil action arising out of the matters which are subject to evaluation and review by such organization.' There never should have been an in camera review of these materials; a fortiori, they never should have been disclosed to the plaintiff; they are not admissible into evidence in this trial of this action.
>
> . . .
>
> The plaintiff takes the position that Camden-Clark made false statements to the Court about the existence of witness statements. The

> interviews conducted by Mrs. Johnston resulted in summaries — it was the peer review investigation conducted by the Medical Staff of Camden-Clark that resulted in the specific statements and those were and are confidential and not subject to the discovery process in their entirety. Hence, the answers given were accurate given that its lips were sealed by the statutory provision of confidentiality and exemption from discovery process . . .

See Camden-Clark's Response at 7-8, 10, 16-17.

74. Once again, the representations made by Camden-Clark, and its counsel, were inaccurate.

75. The West Virginia Supreme Court of Appeals has determined the procedure to follow when a party seeks discovery of allegedly confidential peer-review materials protected from discovery by *W.Va. Code* §30-3C-3. In *State ex rel. Shroades v. Henry*, 187 W.Va. 723; 421 S.E.2d 264 (1992), the Court stated:

> When discovery is sought by identifying existing documents or of documents held by a non-review organization, the party claiming the document is privileged should identify the document by name, date, custodian, source and reason for creation. The mere identification of the documents does not breach the confidentiality afforded by W.Va.

> Code, 30-3C-1 . . . because documents' content, rather than their identity, may be protected from discovery.

Id. At 270, 729.

76. Thus, Camden-Clark was under a legal obligation, from the beginning in 2004, to disclose the identity of the documents it was withholding in the form of a privilege log pursuant to *Shroades.*

77. Furthermore, Camden-Clark was, or should have been, aware of this case law far before February 27, 2006.

78. On approximately March 1, 2005, Plaintiff cited *Shroades* and the procedures to be followed under *W.Va. Code* §30-3C-3 in his Motion to Compel filed with this Court. *See* Plaintiff's Motion to Compel filed on or about March 2, 2005 at 3.

79. On July 21, 2005, the Plaintiff, again, cited *Shroades* and the procedure to be followed when claiming a privilege related to *W.Va. Code* §30-3C-3 in its Response to Camden-Clark's Motion for Protective Order. *See* Response to Camden-Clark's Motion for Protective Order filed on July 21, 2005, at 3.

80. Based on this history, this Court can only conclude that Camden-Clark's action in regard to its justifications for not producing a privilege log were an effort to deny or delay until the last possible minute discovery which the Plaintiff was entitled to. Moreover,

Camden-Clark's last contention, that patently false testimony should be deemed true because a party's "lips are sealed" by a privilege is not only baseless and unsupportable, but insulting to the rule of law generally, which has no provisions allowing false testimony under oath because of a purported privilege. There are rules for the assertions of privileges and Camden-Clark intentionally disregarded them.

IV. Inaccurate Testimony Provided by Camden-Clark's Corporate Representative

81. Camden-Clark was represented by Ms. Johnston, its Risk Manager, at trial and throughout the litigation. Ms. Johnston attended most of the depositions that took place in the Parkersburg area as well.

82. During the pendency of Plaintiff's several motions to compel regarding production of documents, Plaintiff took the deposition of Ms. Johnston on two occasions. On both occasions, Ms. Johnston, who was herself the custodian of many of the withheld documents in this case, testified inaccurately regarding material matters.

83. Ms. Johnston testified inaccurately about her instructions to witnesses to provide copies of notes to her. For example, the following exchange took place during Ms. Johnston's deposition on June 24, 2005:

> **MR. HAYHURST**: Chris, I need to tell you when you use the term 'witness statement,' if

you are — if you are contemplating something that the person filled out in his or her handwriting and signed or something that was prepare for him or her and signed by the person, that's not what we have. What we have is her summary of her interviews with witnesses rather than what I would call a written statement. . . .

MR. REGAN: We've talked about eight people, I guess, or maybe seven that you interviewed. And Mr. Hayhurst just mentioned that — well, why don't you describe to me what you do when you do these interviews in terms of what's produced in terms of a witness statement.

A: What is produced?

Q: Yeah. What do you end up with?

A: All I want to do is capture whatever memory they might have. I let them do the talking. I do explain to them why I'm doing what Im doing and who's requesting it.

Q: Uh-huh.

A: And then I make notes in my own handwriting. I did not ask any of these people to provide their own notes to me or to make notes and then provide them to me.

See Deposition Transcript of Ms. Johnston dated June 24, 2005, at 14-16.

84. In fact, Ms. Johnston had requested notes from Sheila Sleeth (*See* Interview Summary of Sheila Sleeth dated October 11, 2001) and Ms. Haney (*See* Interview Summary of Ms. Haney dated November 1, 2001). In addition, there is evidence that Ms. Johnston asked for notes made by Ms. Burns (*See* Interview Summary of Ms. Burns dated October 16, 2001).

85. In addition, Ms. Johnston testified inaccurately regarding her knowledge of notes or other documents made by hospital employees outside the medical record.

86. In her June 24, 2006, deposition, Ms. Johnston testified as follows:

> **Q**: Did any hospital employees besides — well, no. Did any hospital employees make any notes or records of the incident involving Mrs. Boggs or the aftermath outside of the medical record?
>
> **A**: I can only tell you what I know personally. I think that Anna Haney told me that she did make some notes at the request of, and I can't remember who it was . . .

See Deposition Transcript of Ms. Johnston dated June 24, 2005, at 20-21.

87. In fact, Ms. Johnston's knowledge of documents extraneous to the medical record regarding Mrs. Boggs made by other Camden-Clark employees was extensive.

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From Ms. Johnston's interview summaries, she knew that Ms. Haney made notes *(See* Ms. Haney's Interview Summary dated November 1, 2001); that Sheila Sleeth made notes (*See* Sheila Sleeth Interview Summary dated October 11, 2001, and Ms. Hines' Interview Summary dated October 15, 2001); that Charlie Weddle made notes (*See* Charlie Weddle Interview Summary dated October 30, 2001); and that Ms. Burns certainly claimed she made notes (*See* Ms. Burns' Interview Summary dated October 16, 2001, with notation made on March 15, 2005).

88. In addition to Paragraph 88, Ms. Johnston had the following documents in her possession, as custodian, as listed on the second purported privilege log, referenced in Paragraph 52:

a. E-mail written by Ms. Hines and sent to Ms. Johnston on October 29, 2001, describing the incident involving Mrs. Boggs;

b. Handwritten notes/statement prepared by Betsy Collins on October 4, 2001;

c. E-mail drafted by Cynthia L. Carpenter sent to Ms. Johnston on October 8, 2001, regarding the medications provided to Mrs. Boggs;

d. Typewritten notes/statement by Sheila Sleeth dated as received on October 10, 2001;

e. Handwritten notes/statement by Ms. Humphries, dated October 18, 2001; and

f. Handwritten notes/statement by Charlie Weddle

89. Furthermore, Ms. Johnston inaccurately testified regarding those she had consulted with outside of the individuals she had identified in the deposition.

90. Ms. Johnston testified on June 24, 2005, that she had discussed the Boggs case with the following individuals: Tom Corder, Richard Hayhurst, Allen Butcher, Cynthia Carpenter, Ms. Haney, Sheila Sleeth, Ms. Burns, Ms. Humphries, Scott Riser, Betsy Collins, and Cindy Carpenter. She testified that she could not think of anyone else that she had consulted with. *See* Deposition Transcript of Ms. Johnston dated June 24, 2005, at 30.

91. In fact, Ms. Johnston's files document that she had consulted or discussed the Boggs' case with the following additional individuals: Charlie Weddle, Ms. Hines, Teresa Criss, Kathy Decker, Jonni Stoker, Tracey Fletcher, Roberta K. Howard, Becky Lofty, Jacklyn S. Reed, Patti Williams, and Tammy Mayhew.

92. Ms. Johnston's inaccurate testimony continued in her deposition of January 5, 2006.

93. During that deposition, she testified inaccurately regarding her instructions to witnesses to destroy notes, copies or otherwise.

94. For example, Ms, Johnston testified as follows regarding the notes of Ms. Burns:

> **Q**: Are — are you in possession of the notes that Bernice Burns testified in her deposition?

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A: I have no notes from Bernice Burns.

Q: Do you know who does?

A: I have no idea. I am not aware of the existence of the notes.

Q: Were you ever aware of their existence?

A: No.

Q: Did you ever ask Bernice Burns for her notes?

A: I have no specific memory of that. I may have — I may have asked her if she had any, but I don't remember doing that.

Q: Is there anything about Bernice Burns' notes reflected in your memo, if you made one from interviewing her after what happened to Mrs. Boggs?

A: Now, say that again, I'm sorry.

Q: Sure. Did you interview Bernice Burns after —

A: I did.

Q: — what happened to Mrs. Boggs?

A: I did.

Q: Did you make a memo after that interview?

A: I did.

Q: Does that memo include anything about Ms. Burns' notes?

A: It does not.

See Deposition of Ms. Johnston dated January 5, 2006, at 8-9.

95. This testimony is directly contradicted by the Interview Summary of Ms. Burns prepared by Ms. Johnston. This Interview Summary, dated October 16, 2001, mentions Ms. Burns' notes more than once. In fact, Ms. Johnston reports in her Interview Summary that Ms. Burns believed she made notes and gave them to Ms. Johnston. Moreover, the Interview Summary also documents that Ms. Burns asked Ms. Johnston for her notes back. Ms. Johnston claimed later that the notes never existed. However, her testimony that her Interview Summary memorandum did not "include anything about Ms. Burns' notes" was plainly inaccurate.

96. This omission was material because Ms. Burns was an important witness not only to the medical care Mrs. Boggs received, but also regarding the disappearance of time indexes from Mrs. Boggs' cardiac rhythm strips. Furthermore, Ms. Burns' interview

tended to support the Plaintiff's allegations of spoliation and record destruction, because it documented Ms. Burns' clear recollection that she had made notes and given them to Ms. Johnston, a fact that contrasted with the Camden Clark's claim that the notes did not exist.

97. Furthermore, Ms. Johnston continued to inaccurately testify regarding those she interviewed.

98. In her January 5, 2006, deposition, Ms. Johnston stated she interviewed the following individuals: Ms. Haney, Ms. Burns, Sheila Sleeth, Ms. Humphries, and Charlie Weddle.

99. However, Ms. Johnston also interviewed Ms. Hines and Teresa Criss. Neither of these individuals were ever identified by Ms. Johnston as being interviewed by her even though written Interview Summaries were produced from her files.

100. Furthermore, Ms. Johnston gave additional testimony that was both inaccurate and misleading in her January 5, 2006, deposition, regarding instructions to nurses to destroy notes. In that deposition, she stated:

> **Q**: Okay. Have you ever told a nurse to do that?
>
> **A**: To do what?
>
> **Q**: To destroy notes they had made regarding a patient.

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A: That's not something that I would normally do. Would I ever do it? You know, nurses don't go around making a great deal of notes. I just don't See that happening very often. I always ask them or at least I always try to ask them, Do you have notes? That I can tell you for certain. I have never told a nurse, Destroy your notes so that they can't be discovered, ever. Now, would I like a nurse — would I like to have the only copy of notes, you know, that — that depends. You know, in this case she's already given the notes or at least she says she's given the notes to the family. Why would I ever tell her, Well, destroy your copy so that they can't be discovered. It just doesn't make sense.

. . . .

Q: — if you can clarify what I'm getting at, what you're saying, I would appreciate it. When you say I wouldn't normally tell a nurse to destroy her notes after you get a copy or you get the originals, you wouldn't normally do that, it strikes me that you can envision some circumstance where you would do it, where it happened.

A: It's just not part of my normal repertoire. You know, I will — I'm gonna ask them if they have notes, and if they do I'd like to have them. And it usually ends right there.

> **Q**: So you just can't remember whether it's come up before or not whether you've had to tell a nurse to destroy her copies?
>
> **A**: To destroy her copies?
>
> **Q**: Right.
>
> **A**: I don't have a memory of it. . . .

See Deposition Transcript of Ms. Johnston dated January 5, 2006, at 41 - 44.

101. Documents later established that Ms. Johnston had told Ms. Haney to "throw away" her copy of her notes and had told Charlie Weddle to "destroy" his. *See* Interview Summaries of Ms. Haney and Charles Weddle taken by Ms. Johnston. Moreover, Ms. Burns had told Ms. Johnston she had taken Ms. Burns' notes and asked for them back, though Ms. Johnston claimed never to have had them. This was documented in Ms. Johnston's own files, regarding interviews she conducted herself.

102. In addition, Ms. Johnston's testimony concerning instructions to destroy notes was misleading because although it was true that Ms. Haney had provided some of her notes to the family, Ms. Johnston did not appear to know that when she instructed Ms. Haney to "throw away" her copy. Ms. Johnston's detailed interview summary with Ms. Haney nowhere indicates that Ms. Haney told her the Boggs family had the notes, though the interview lists every other person to whom they might have been disclosed.

103. Finally, Camden-Clark's counsel represented on the record during Ms. Burns' depositions that her notes were being withheld as privileged, but later argued the notes did not exist. The following colloquy took place at Ms. Burns' deposition:

> **MR. REGAN**: Just so I'm not under any misapprehension, counsel, those have not been produced in discovery, have they?
>
> **MR. HAYHURST**: What are you talking about?
>
> **MR. REGAN**: The notes.
>
> **MR. HAYHURST:** What notes?
>
> **MR. REGAN**: The ones Mrs. Burns is talking about.
>
> **MR. HAYHURST:** No.
>
> **MR. REGAN**: They have not been produced?
>
> **MR. HAYHURST:** Correct.
>
> **MR. REGAN**: Are they being withheld under some claim of privilege?
>
> **MR. HAYHURST:** Yes. And they're statutorily exempt from disclosure.

See Deposition Transcript of Ms, Burns at 57-58. Camden-Clark has never produced the Burns notes at all, later claiming they did not exist.

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V. Incorrect and Incomplete Testimony Given by Hospital Employees that went Uncorrected, Despite Camden-Clark's and its Counsel's Knowledge that it was Incomplete and Incorrect.

104. As described above, Camden-Clark possessed contemporaneous interviews of and also notes from most of the key witnesses under Camden-Clark's control. These interviews and notes, made close to the time of the incident involving Mrs. Boggs, revealed a far more detailed picture of what happened to Mrs. Boggs than the depositions of those same individuals taken several years after the fact.

105. In a number of instances, Camden-Clark, the corporation, knew its current or former employees or agents were testifying inaccurately or incompletely, but permitted them to do so. In addition, Camden-Clark's counsel, who had received and reviewed all of the information held by Camden-Clark also allowed Camden-Clark's employees to testify falsely or incompletely. It is entirely possible that the employees innocently failed to recall certain facts after several years had passed, but Camden-Clark possessed detailed documentation of the facts such that the inaccurate and erroneous character of the employee testimony was within its corporate knowledge. *See* W.Va.R.Civ.Pro. 30(b)(6)-(7). Moreover, Camden-Clark was under court order to produce these documents, but did not do so.

106. For example, Ms. Johnston and Mr. Hayhurst were present at the deposition of Charles Weddle on December 19, 2005.

107. At that deposition, Charles Weddle testified that he never made any notes or documents related to the Boggs case. *See* Deposition Transcript of Charles Weddle at 17.

108. In fact, Ms. Johnston conducted an interview with Charles Weddle on October 10, 2001. In her Interview Summary, Ms. Johnston documents that Mr. Weddle indicated he had made notes or written down his memories of what happened and provided this writing to Cindy Carpenter. He also indicated he kept a copy, which Ms, Johnston instructed him to destroy. *See* Interview Summary of Charles Weddle dated October 30, 2001.

109. Furthermore, Camden-Clark and its counsel allowed Ms. Burns and Sheila Sleeth ("Ms. Sleeth") to testify inaccurately or in materially incomplete ways at their respective depositions. Ms. Johnston's interview summaries with respect to Ms. Burns and Ms. Sleeth provide very detailed descriptions of what took place with Mrs. Boggs on September 29, 2001. Their respective deposition testimony is not nearly as specific or as suggestive of the liability of Camden-Clark or Koyawala as their interviews. *Cf.* Interview Summaries of Ms. Burns and Ms. Sleeth with Deposition Transcripts of Ms. Burns and Ms. Sleeth.

110. Ms. Sleeth's interview summary also provides information related to Plaintiff's claim regarding destruction of medical records. This was not mentioned by Ms. Sleeth during her deposition.

111. Ms. Sleeth also testified that she did not write anything down. In fact, Ms. Johnston had possession of a written statement made by Ms. Sleeth.

112. Ms. Burns' interview summary provides information related to the possible destruction of notes made by Ms. Burns' that was far more detailed than the discussion of this topic during Ms. Burns' deposition.[13]

113. Finally, Camden-Clark and its counsel allowed Ms. Haney, Ms. Burns, Ms. Sleeth, Charles Weddle, and Ms. Hines to testify over four years after the incident involving Mrs. Boggs without letting them review their respective interview summaries or written statements or notes prepared by Ms. Johnston in the immediate aftermath of September 29, 2001 even though Burns specifically asked for them. Given the lapse of time between the events and the deposition, it is possible and even likely that the incorrect testimony was brought on by innocent lack of recollection. However, Camden-Clark possessed detailed documents, letting it and its counsel know that the testimony was incorrect or incomplete.

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13. In addition, counsel for Camden-Clark claimed, during Ms. Burns' deposition, that these notes were being withheld under a claim of privilege and later argued they did not exist.

114. This pattern of allowing witnesses to testify incompletely or falsely is significantly aggravated Camden-Clark's counsel's assertions that Camden-Clark's counsel *represented* the witnesses who testified incompletely or inaccurately in this case. *See, e.g.*, Deposition Transcript of Ms. Sleeth at 53; Deposition Transcript of Ms. Burns at 76; Deposition Transcript of Ms. Hines at 10.

VI. Camden-Clark, through its Counsel and its Witnesses made Misleading or Inaccurate Statements to the Court, the Plaintiff and the Jury, both in Pre-trial Proceedings and at Trial.

115. In June of 2004, Plaintiff served his first set of discovery requests upon Camden-Clark. Camden-Clark filed objections and responses in July of 2004. After a good faith effort to resolve certain objections to the discovery asserted by Camden-Clark, in December of 2004, Plaintiff moved to compel. During the hearing on the parties' respective motions to compel held on December 20, 2004, Plaintiff's counsel stated:

> **MR. REGAN**: . . . the Defendant [Camden-Clark] is withholding a substantial number of documents from us, and we would like to get ahold of these documents and have the opportunity to discover our case.

See Transcript of December 20, 2004, hearing at 39.

116. Counsel for Defendant Camden-Clark stated:

> **MR. HAYHURST:** The only thing we have held from them is the privilege files of the doctors involved. Everything else has been supplied.

Id.

117. As of the time the previous statement was made, Camden-Clark was, in fact, withholding, at least, the following:

> a. An incident report regarding Mrs. Boggs' death;
>
> b. A letter from David A. Gnegy ("Dr. Gnegy") recounting the events leading to Mrs. Boggs' death;
>
> c. Witness statements taken by Ms. Johnston;
>
> d. Notes and handwritten statements by personnel involved in Mrs. Boggs' medical care; and
>
> e. Hundreds of other pages of documents submitted to this Court in December of 2005. *See infra.*

118. Pursuant to this hearing, counsel for Camden-Clark represented that it would produce a privilege log related to materials it was withholding:

> **THE COURT**: I will not do an in camera inspection, but you can produce the log of

these matters. You can't just erect a Chinese wall and say we can't go beyond that.

MR. HAYHURST: May I have the same 30 days, Your Honor?

THE COURT: Yeah, sure. All right.

See Transcript of December 20, 2004, hearing at 46.

119. Following this hearing, Camden-Clark submitted a privilege log related to the credentialing file of Dr. Koyawala. However, it did not submit a privilege log or protective order with respect to any other documents it was withholding.

120. At a Court hearing on May 23, 2005, five months after the hearing discussed previously, Camden-Clark's discovery responses were again discussed. When the Court took notice of Plaintiff's concerns regarding Camden-Clark's answers, the following exchange took place:

MR. REGAN: The basis for its [motion to compel's] resolution was Mr. Hayhurst's representation to the Court that nothing that had been requested in Plaintiff's discovery of which we are complaining in that motion, nothing had been withheld, except what's being submitted for in camera review.

MR. HAYHURST: Yeah.

See Transcript of May 23, 2006, hearing at 15-16.

121. The Court inquired further, and a colloquy took place emphasizing what it was PIaintiff sought from Camden-Clark including written statements, variances, incident reports, complaints, written statements and allegedly peer-review materials. *Id.* At 16-18, 21-22.

122. Counsel for Camden-Clark assured the Court:

> **MR. HAYHURST:** I don't want to misrepresent anything. I don't think there's been anything — any complaint made about Dr. Koyawala, except insofar as the peer review that's involved in this case is implicated, but I don't want — I want to confirm that before I — but if there were, I would take the same position and would make the same — I'd submit them as well within ten days. And what else were they?
>
> . . .
>
> **MR. HAYHURST:** Well, that's not so. My investigator has interviewed some of the percipient witnesses, but that's clearly work product.
>
> . . .
>
> I'm not sure anything in the investigation constituted a statement, but I'll have to review it; and if the Court please, I will deal with it the same way you allowed me to deal with the

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> Koyawala letter [i.e, to file a motion for a protective order within ten days].

Id. At 17-18. *See also* Order from May 23, 2005, hearing at 2-3.

123. This was the first disclosure to the Court of both the existence of an 'investigator' and the existence of statements taken from witnesses by Camden-Clark. They were not identified as being withheld or as existing at all, before the May 23 hearing, despite Camden-Clark's counsel's representation at the December 20, 2004, hearing that nothing was being withheld under claim of work product privilege. *Cf.* Transcript of December 20, 2004 hearing at 40.

124. In addition, at the hearing on May 23, 2005, Camden-Clark, through its counsel, once again agreed to provide a privilege log or protective motion:

> **THE COURT:** But you said ten days; right?
>
> **MR. HAYHURST:** You said ten days, and that's perfectly acceptable to me.
>
> **THE COURT:** I never said ten days on this one.
>
> **MR. HAYHURST:** No, I'm asking for ten days.
>
> **THE COURT:** Okay. All right. The Motion to Compel is granted. The information requested

> to interrogatory number 9, 10, and 11, and request for production 16, 5, 6, 7, and 8 are to be provided within ten days, unless within that time a Motion for a Protective Order or some kind of privilege log or the procedure is complied with.
>
> **MR. HAYHURST:** Thank you, Your Honor.

See Transcript of May 23, 2005, hearing at 22.

125. Camden-Clark filed a motion for a protective order, it pertained only to the credentialing file of Dr. Koyawala (as to which it was granted) and a letter written by Dr. Gnegy (as to which it was denied). No in camera submission of any other documents was made after May 23, 2005, and before the Court's next hearing on this issue on August 3, 2005, regarding any allegedly peer review documents, incident reports, witness statements or any of the documents pertinent to the alleged investigation conducted by Ms. Johnston.

126. The issue of discovery of an incident report regarding Mrs. Boggs and the events of September 29, 2001, was addressed at each of the hearings on December 20, 2004 and May 23, 2005. *See* Transcript of December 20, 2004, hearing at 43 and Transcript of May 23, 2005, hearing at 17.

127. The existence of an incident report was not identified as existing in any of Camden-Clark's discovery responses or at either of the first two hearings previously discussed.

128. During Ms. Johnston's deposition on June 24, 2005, the existence of an incident report was confirmed:

> **Q**: Does the hospital require incident reports or does it have a process of creating incident reports when unusual events take place at the hospital?
>
> **A**: Yes.
>
> **Q**: Okay. Was an incident report created with respect to the death of Hilda Boggs?
>
> **A**: I believe, yes.
>
> **Q**: Where is that incident report?
>
> **A**: I am the keeper of all incident reports.
>
> **Q**: Do you keep the incident reports in your office or somewhere else?
>
> **A**: In my office in a locked file, yes?
>
> **Q**: When was the incident report regarding Hilda Boggs prepared?
>
> **A**: I don't remember.
>
> **Q**: What would be typical?
>
> **A**: Typical would be within the 24-hour period of the incident itself.
>
> **Q**: What does the incident report consist of?

A: It would consist of, and I'm just gonna pull this out of my memory, patient's name, patient demographics found on the addressograph, date of the occurrence, the date of the incident report, the name of the person filling out the incident report, a narrative of the incident, whether the doctor had been notified of the incident.

Q: Is there a form that —

A: Yes.

Q: — requests all those different thing?

A: Yes, there is.

Q: And is that form filled out routinely by hospital personnel when incidents occur?

A: Yes.

See Deposition Transcript of Ms. Johnston dated June 24, 2005 at 10-12.

129. Furthermore, Camden-Clark's counsel was present for the deposition of Ms. Johnston on June 24, 2005.

130. However, less than six weeks later, on August 3, 2005, after Ms. Johnston had confirmed the existence of an incident report for the incident involving Mrs. Boggs, counsel for Camden-Clark represented to this Court that such an incident report is, in fact, a different document, or may not even exist:

MR. HAYHURST: Your Honor, that is not so. The incident report refers to Doctor Gnegy's letter. That has been submitted to the Court for in-camera review.

THE COURT: Is that what you're calling the incident report?

MR. HAYHURST: Yes, that's what he's calling the incident report, but Doctor Gnegy's letter —

THE COURT: Is there something besides Doctor Gnegy's letter that —

MR. HAYHURST: No. Doctor Gnegy's letter was addressed to Doctor Daniel McGraw, who was the chairman of the -

. . .

— medical staff, and it was the initiating factor in the peer review investigation of medical care administered to the Plaintiff's decedent . . .

. . .

MR. REGAN: I want to be just clear, Judge, that we do have testimony that there is an incident report and a letter. Those are two separate documents. . . .

MR. HAYHURST: Judge, I am unaware of any separate incident report. Now, my best belief is that the — what they're calling an incident report is the letter from Dr. Gnegy. I don't want to misrepresent anything to the Court. I want to be careful about what I say, but I'm unaware of any other incident report.

. . .

The incident report, as I say, I believe that we're talking about Doctor Gnegy's letter there. If there is another one, I don't — I'm not — I don't appreciate that there's another one. They say there is. They seem to know more about what's going on in my hospital than I do, but I don't know of any other . . .

See Transcript of August 3, 2005, hearing at 14-15, 16-17, 29-30. *Cf.* with Deposition Transcript of Ms. Johnston dated June 24, 2005, at 10-12. Additionally, the preparation of incident reports is routine at Camden-Clark and counsel's representation that he knew nothing about one is not credible.

131. Also at the August 3 hearing the issue of witness statements was raised again:

THE COURT: What about witness statements?

MR. HAYHURST: We have taken no witness statements, your Honor.

THE COURT: They said there were.

MR. HAYHURST: No, there are summaries of interviews. . . . They are not formal witness statements; they're not signed by the witnesses . . .

See Transcript of August 3, 2005, hearing at 11.

132. Mr. Hayhurst's statements in Paragraph 131 were inaccurate. At the time of this hearing, Camden-Clark had written and/or signed statements from Betsy Collins, Ms. Sleeth, Ms. Humphries, and Charles Weddle.

133. Furthermore, also at the hearing of August 3, 2005, the failure of Camden-Clark to comply with the previous two Court orders was again raised. By the conclusion of this hearing, the Court had again ordered Camden-Clark to respond to the Plaintiff's discovery requests and to either produce all the documents contemplated by the requests and at the hearing to the Plaintiff within seven (7) days, unless a privilege log and in camera submission was made first. *See* Transcript of August 3, 2005, hearing at 31-32.

134. Counsel for Camden-Clark agreed to comply with this Order:

THE COURT: Okay. Anything that's not been turned over can you submit within seven days?

MR. HAYHURST: Yes, sir.

> **THE COURT**: Submit it to the Court for an in-camera review anything that's not previously been provided to the Plaintiff and you're asserting a privilege of either attorney/client or work product.
>
> **MR. HAYHURST**: And identify which and the basis for it.
>
> **THE COURT**: Correct.

See Transcript of August 3, 2005, hearing at 33.

135. Camden-Clark did not comply with this Court's August 3 Order or with its representation to this Court. This is the third Order regarding production of documents that Camden-Clark directly disobeyed and, at least, the third misrepresentation to this Court regarding Camden-Clark's willingness to comply. *See* Part II, *supra*.

136. Due the failure of Camden-Clark to file a privilege log or an appropriate motion for protective order for the documents it was withholding from Plaintiff, Plaintiff filed a Motion for Sanctions that was heard on December 19, 2004.

137. At this hearing, counsel for Camden-Clark admitted that it had previously failed to comply with this Court's orders on three occasions, which he himself represented they would do:

> MR. HAYHURST: . . . The issue that's before the Court is — has to do with the failure earlier to deposit documents with the Court for in-camera review on our claim of work product, attorney/client privilege and the statutory bar against discovery that's set forth in West Virginia Code, Section 30-3C-3. I admit freely that the prior deadlines of the Court were not met . . .

See Transcript of December 19, 2005, hearing at 49.

138. Counsel for Camden-Clark's inaccurate representations to this Court continued in the same hearing of December 19, 2005. When the issue of the pursuit of a writ from this Court's Orders of August 3, 2005, the following colloquy took place:

> **THE COURT:** Mr. Hayhurst, you had talked about appealing the August 3, 2005, order, but you never did?
>
> **MR. HAYHURST:** Well, my intention was if you directed anything to be disclosed to the Plaintiff, that I was going to seek a writ of prohibition, and for obvious reasons, you haven't ordered any disclosure yet.
>
> **THE COURT:** It looks like they got it today.
>
> **MR. HAYHURST:** I understand. I don't mean to be cute about it. There wasn't any

> particular reason for me to seek a writ of prohibition against your determination that she wasn't my agent.
>
> **MR. REGAN**: That's why he asked for the stay. It makes sense.
>
> **MR. HAYHURST**: No, it was incident to the issue of whether her file was to be disclosed, and you've not ordered disclosure of any file yet.

See Transcript of December 19, 2005, hearing at 54-55.

139. Mr. Hayhurst's representations in Paragraph 138 regarding the circumstances surrounding the issued stay are erroneous. *See* August 31st Order of this Court at 3-4. *See also* pages 24, 34-35 of August 3, 2005, hearing transcript; ¶ 62, *supra.*

140. The inaccurate representations to this Court continued in the same hearing regarding the existence/non-existence of Ms. Burns' notes:

> **MR. REGAN**: It's unbelievable. It is unfathomable to conceal to that extent. He told me two weeks ago he had notes from Burnice Burns and that they were subject to privilege.
>
> **MR. HAYHURST**: No, we didn't. Absolutely not

See Transcript of December 19, 2005, hearing at 63.

141. Despite Mr. Hayhurst's statement "[a]bsolutely not" at the December 19 hearing, he had in fact told Mr. Regan that Ms. Burns' notes were being withheld subject to privilege, exactly as attorney Regan had said:

> **MR. REGAN**: Just so I'm not under any misapprehension, counsel, those have not been produced in discovery, have they?
>
> **MR. HAYHURST**: What are you talking about?
>
> **MR. REGAN**: The notes.
>
> **MR. HAYHURST**: What notes?
>
> **MR. REGAN**: The ones Mrs. Burns is talking about.
>
> **MR. HAYHURST**: No.
>
> **MR. REGAN**: They have not been produced?
>
> **MR. HAYHURST**: Correct.
>
> **MR. REGAN**: Are they being withheld under some claim of privilege?
>
> **MR. HAYHURST**: Yes. And they're statutorily exempt from disclosure.

See Deposition Transcript of Bernice Burns at 57-58.[14].

142. Counsel for Camden-Clark's erroneous statements continued during the trial of this case.

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14. Ms. Burns' deposition took place on November 28, 2005, approximately three weeks prior to the December 19, 2005, hearing.

143. During opening statements for Camden-Clark, conducted on February 28, 2006, counsel for Camden-Clark stated to the jury:

> Once they have successfully completed their professional status, then it is up to the doctors, in the hospital, to decide whether they want this physician as a part of their company. Administration doesn't make that decision. The CEO of the hospital doesn't make that decision. Truly, the board of directors doesn't make that decision. It is other doctors in the hospital, called the medical staff, who make, the decision whether to issue credentials to a physician.

See Transcript of Defendant's Opening Statement dated February 28, 2006, at 21.

144. The representation made by counsel in Paragraph 143 was inaccurate.

145. In fact, it is the Board of Directors of Camden-Clark Memorial Hospital Corporation who make the ultimate decision as to whether to issue credentials to a physician or not.

146. On March 6, 2006 Camden-Clark called Cynthia Carpenter ("Ms. Carpenter") to testify on its behalf. Ms. Carpenter is a former employee of Camden-Clark who, at the time of the incidents involving Mrs. Boggs, was responsible for Camden-Clark's quality program; for

overseeing the medical staff; and for overseeing the office functions of credentialing and privileging of physicians.

147. During Mr. Hayhurst's direct examination of Ms. Carpenter, the following exchange took place:

> Q: Application, verification of credentials, credentials committee looks at the matter and makes a recommendation to medical executive; medical executive committee looks at it and then what happens?
>
> A: They review it and they would make a recommendation on up to the board whether or not this person should be put on staff and as to what privileges should be granted.
>
> Q: And the board of directors ultimately decides —
>
> A: Ultimately makes the decision which physicians should be on staff and what privileges they should be granted.

See Direct Examination of Ms. Carpenter dated March 6, 2006, at 83-84.

148. Also during Opening Statements, counsel for Camden-Clark stated:

> The evidence in this case will be that Dr. Koyawala successfully passed his screening

and was successful in passing his recertification process every two years from 1994 until 2002. In 2002, he went to — he decided to move to Columbus, and he was re-examined in Columbus by the doctors of Children's Hospital, the large regional Children's Hospital in Columbus, as an applicant to provide anesthesia to children there. And he successfully passed that credentialing examination.

See Opening Statement of Camden-Clark at 23.

149. In fact, Dr. Koyawala does not have privileges at Children's Hospital in Columbus, and one of Plaintiff's witnesses, Glenn P. Gravlee, M.D., corrected counsel for Camden-Clark:

Q: Are you familiar with Children's Hospital?

A: Yes.

Q: Do you practice over there?

A: No.

Q: Do you interface with doctors who do?

A: Occasionally.

Q: Do you know that to be a hospital that is careful about its credentialing hospitals?

A: I don't know that no.

Q: Do you have an impression?

A: My impression is that they do.

Q: All right. Are you aware that Dr. Koyawala is now credentialed and has been, since 2002, to deliver pediatric anesthesia at Children's Hospital in Columbus?

A: No.

Q: You are not aware of this?

A: No.

Q: Didn't you read his deposition?

A: I thought his deposition indicated that he was practicing at Grant Hospital in Columbus.

Q: And you may very well be right. Do you know Grant to be a carefully credentialing hospital?

A: To my knowledge, yes.

Q: Do you know of any reason, based on everything you know, why he shouldn't have been credentialed at Grant Hospital to deliver pediatric anesthesia?

> A: Well, it wouldn't be pediatric anesthesia, necessarily. Grant Hospital is not a pediatric hospital, but I know of no reason why he shouldn't.

See Cross-Examination of Glenn P. Gravlee by Mr. Hayhurst dated March 1, 2006, at 66-67. No evidence ever surfaced to support counsel for Camden-Clark's claim that Dr. Koyawala had privileges at Children's.

150. Finally, in opening statements, counsel for Camden-Clark stated:

> So, in contrast to what Mr. Regan said he going to prove to you, the time signatures — the time indications on the rhythm strips, that were taken in the OR, were not obliterated, did not disappear. They were never there in the first place.

See Opening Statement of Camden-Clark dated February 28, 2006, at 33.

151. The representation made by Mr. Hayhurst in Paragraph 150 were inaccurate based upon clear and convincing evidence at the trial.

152. In fact, the beginning portions of Mrs. Boggs cardiac monitor strips containing information such as the date and time of when the strips were produced had not been included in her medical record. It was uncontroverted at trial that the EKG machines produce

time indexes, either at the beginning of a strip, along the top, or both. The indexes for Mrs. Boggs' strips disappeared.

153. In addition, Camden-Clark, and its counsel presented testimony from its expert witnesses, by soliciting them to give expert testimony without allowing them to review all the relevant factual evidence in this case.

154. For example, Camden-Clark allowed Cynthia Kern, its Director of Medical Staff and Information Services and an expert on medical records, to testify that Camden-Clark maintained the integrity of Mrs. Boggs' medical record and that it was the responsibility of Camden-Clark to guarantee or vouch for the accuracy of Mrs. Boggs' medical record. *See* Direct Examination of Cynthia Kern at 49-50.

155. However, despite Camden-Clark's knowledge to the contrary as discussed herein, Ms. Kern was never informed by anyone at Camden-Clark that Mrs. Boggs' record was incomplete (*See Id.* At 52); that Dr. Koyawala had been observed removing documents from the medical record (*See Id.* At 53); that Dr. Koyawala was observed attempting to alter the notes of another physician (*See Id.*); that Mrs. Boggs' cardiac rhythm strips may have been tampered with (*See Id.* At 55 – 58); or that nurses had taken separate notes outside of the medical record (*See Id.* At 69).[15]

15. Ms. Kern testified that had she been aware of these issues, she would have investigated them thoroughly.

156. in another example, Camden-Clark allowed Philip Balestrieri ("Dr. Balestrieri"), an anesthesiologist called as an expert by Camden-Clark, to testify that Dr. Koyawala did not commit negligence in his care and treatment of Mrs. Boggs.

157. However, Camden-Clark only provided Dr. Balestrieri with, and he only reviewed, Mrs. Boggs' medical record, the discovery depositions, and Dr. Gravlee's trial testimony. *See* Cross-Examination of Dr. Balestrieri at 133.

158. He did not review the additional interview summaries, statements, and other documents, that provide a more detailed picture of what transpired with Mrs. Boggs on September 29, 2001. *Id.* At 133 – 134.

159. Finally, Camden-Clark allowed Melissa Martin to testify as an expert on medical recordkeeping. In her testimony, she testified that Camden-Clark had met all applicable standards of care in the preservation and maintenance of Mrs. Boggs' medical records. *See* Direct Examination of Melissa Martin dated March 7, 2006, at 166.

160. However, Camden-Clark had not provided Melissa Martin with any documents other than Cindy Kern's deposition, Arthur Shorr's deposition, Ms. Haney's deposition, the OHFLAC reviews, and the policies and procedures of Camden-Clark. *See* Cross-Examination of Melissa Martin dated March 7, 2006, at 180.

161. She was not made aware of Dr. Koyawala's attempts to coordinate stories (*See Id.* At 181); Ms. Haney's personal notes (*See Id.* At 182); the removal of records by Dr. Koyawala (*See Id.* At 182 – 183); the destruction of time records on Mrs. Boggs' cardiac rhythm strips (*See Id.* At 184); witness interview summaries (*See Id.* At 185); or Dr. Gnegy's letter (*See Id.* At 198 – 199).

VII. Camden-Clark's Inaccurate Answer to the Plaintiff's Amended Complaint

162. The accuracy and integrity of the medical record of Mrs. Boggs was a central issue in the claims against Camden-Clark.

163. As outlined below, Camden-Clark knew the medical record was inaccurate and incomplete but took the litigation position that the medical record was accurate and in accord with all applicable standards of care.

164. In his Amended Complaint filed on January 5, 2004, Plaintiff asserted that, subsequent to the medical care provided by Manish I. Koyawala, M.D. ("Dr. Koyawala"), the Defendant anesthesiologist in this case, Camden-Clark maintained a false, misleading, and/or inaccurate medical record related to the medical care of Mrs. Boggs. *See* Paragraph 50 of Plaintiff's Amended Complaint filed on January 5, 2004.

165. Camden-Clark denied this allegation in total in its Answer filed on May 4, 2004.

166. However, at the time Camden-Clark filed this Answer, it had the following information in its files, which was not contained in any of Mrs. Boggs' routinely kept medical records:

a. Letter of David A. Gnegy dated September 30, 2001, documenting oxygen saturation levels of Mrs. Boggs;

b. Handwritten notes of Evelyn Melvin, CRNA, dated received as of October 5, 2001, documenting care in the form of time-related blood pressures and a time of the initial sign of problems;

c. Claims Summary dated October 9, 2001, documenting that the CRNA in this case had attempted to administer the spinal anesthetic in this case; that the monitor alarms in Mrs. Boggs' case were turned off; that the CRNA assigned in this case did not have privileges issued to her by Camden-Clark to administer spinal anesthetics at Camden-Clark Memorial Hospital, and that the CRNA's actions and treatment of Mrs. Boggs and the status of the monitors were not reflected in the medical record of Mrs. Boggs;

d. Handwritten notes of Sheila Sleeth dated October 10, 2001, documenting that the CRNA attempted to perform the spinal two or three times prior to Dr. Koyawala administering the spinal and various observations of Mrs. Boggs;

e. Interview Summary for Sheila Sleeth dated October 11, 2001, documenting the care provided by the CRNA to Mrs. Boggs; that the CRNA's signature does not appear on any of the anesthesia related records; blood in the spinal needle; complaints from Mrs. Boggs regarding pain in her shoulder; and various observations of Mrs. Boggs during her treatment;

f. Interview Summary of Denise Humphries dated October 12, 2001, documenting the care provided by the CRNA; Mrs. Boggs' complaint regarding her shoulder; various observations of Mrs. Boggs during her treatment; and the proximity of the CRNA and anesthesiologist to Mrs. Boggs when the emergency in her medical care occurred;

g. Handwritten notes of Denise Humphries dated October 18, 2001, documenting the CRNA's attempted administration of the spinal;

h. West Virginia Office of Health Facility Licensure and Certification ("OHFLAC")

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Investigation Exit Summary Memorandum dated October 10, 2002, documenting that Mrs. Boggs' medical record was inaccurate; and

i. Camden-Clark Internal Memorandum dated February 12, 2003, documenting the Medical Records Committee's instruction to the Director of Medical Records to close Mrs. Boggs' medical record as incomplete.

167. These documents demonstrate that, without doubt, the medical record of Mrs. Boggs was inaccurate and incomplete. As such, the medical record presents a misleading picture of what actually transpired with Mrs. Boggs on September 29, 2001, in the operating room at Camden-Clark. Most of the evidence implicating Koyawala and the Hospital was in the myriad of documents kept out of the medical record and wrongfully withheld from the Plaintiff.

168. The documents referenced in Paragraph 166 were mostly disclosed to Plaintiff on February 10, 2006. Camden-Clark knew about the existence of these documents at the time the Answer referenced in Paragraph 166 was filed.

169. Compounding the intentional aspects of this conduct is the act of Camden-Clark and its counsel filing the exact same answer to Plaintiff 's Amended Complaint filed on April 19, 2005. *Cf.* Answer, Crossclaim, and Counterclaim of Camden-Clark filed on May 23, 2005.

170. Camden-Clark's strategy in denying, throughout the case, things it knew well to be true went far beyond the privilege of putting the Plaintiff to his proof. By breaching court orders, filing false discovery responses and by giving and permitting to be given inaccurate testimony under oath, and through multiple false statements to the Court, the Plaintiff and the Jury, Camden-Clark engaged in litigation misconduct.

171. The Court has itemized numerous instances of misconduct in these Findings of Fact, but must also state that it is not an exhaustive listing.

CONCLUSIONS OF LAW

I. Jurisdiction of this Court to Determine the Issues Raised by Plaintiff

172. Camden-Clark has asserted that this Court lacks jurisdiction to entertain Plaintiff's request for sanctions due to this Court's entry of a judgment order. *See* Response of Defendant Camden-Clark to Plaintiff 's Renewed Motion for Sanctions and Motion for Attorneys' Fees and Costs at 6. This contention is without merit.

173. The Supreme Court of Appeals of West Virginia has addressed this question in *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996). In *Bartles*, the Supreme Court stated:

> A trial court is deprived of jurisdiction only when it has entered a 'final' order within the

> contemplation of W.Va. Code, 58-5-1 (1925), and the final order has been appealed properly to this Court . . . At the time of the appeal, there remained pending in the trial court a viable motion . . .

See Bartles at 389, 834.

174. The Supreme Court further explained its decision in *Bartles* in *Dodrill v. Egnor* 198 W.Va. 409, 481 S.E.2d 504 (1996):

> Petitioner *Dodrill* first asserts that the trial court lacked jurisdiction over discovery after it entered judgment for the defendants on the issue of liability. We recently addressed the issue of a trial court's jurisdiction to entertain sanctions after the entry of judgment in *Bartles v. Hinkle* [citations omitted] . . . This Court found that because there was a motion pending in the trial court at the time of the appeal, jurisdiction over that issue remained in the trial court . . . A trial court is deprived of jurisdiction only when it has entered a 'final' order within the contemplation of W.Va. Code, 58-5-1 . . . and the final order has been appealed properly to this Court . . .

See Doddrill at 412-413, 507-508.

175. As the record clearly demonstrates, Plaintiff had filed a motion for sanctions prior to entry of judgment together with a renewed motion for sanctions and award of attorney's fees after entry of judgment but prior to appeal.

176. Based on the guidance of *Bartles* and *Dodrill*, this Court retains jurisdiction over the issue of sanctions since two motions for sanctions remain pending before this Court, since the litigation misconduct of Camden-Clark was not addressed in the Judgment Order entered in the case at bar, and since Camden-Clark had not filed an appeal regarding the Judgment Order when the motions were made.

II. Basis of Authority to Shift Attorney Fees from the Plaintiff to the Defendant

177. This Court has the authority to sanction litigants through the shifting of attorney fees, based on multiple sources of law.

178. The authority to impose sanctions on parties or their attorneys is one of the inherent powers recognized by the state of West Virginia.

179. In *Daily Gazette Company, Inc. v. Canady*, 175 W.Va. 249, 332 S.E. 2d 262, the West Virginia Supreme Court of Appeals ("Supreme Court") stated:

> The concept of 'inherent power' of the judiciary is well recognized in this jurisdiction.

Appendix B

In Syllabus Point 3 of *Shield v. Romine* [citations omitted], this Court noted the general rule that, 'A court 'has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.' . . . This Court has acknowledge inherent judicial powers in a variety of contexts at both the appellate and trial court levels. *See, e.g.*, . . . *Prager v. Mecklin*, 310 S.E.2d 852 (W.Va. 1983) (imposition of sanctions to maintain a fair and orderly trial); . . . *Hendershot* v. *Hendershot*, 263 S.E.2d 90, 96-97 (W.Va. 1980) (imposition of civil contempt sanctions) . . .

. . .

Although there is an undeniable interest in the maintenance of unrestricted access to the judicial system, unfounded claims or defenses asserted for vexations, wanton, or oppressive purposes places an unconscionable burden upon precious judicial resources already stretched to their limits in an increasingly litigious society. In reality, to the extent that these claims or defenses increase delay or divert attention from valid claims or defenses asserted in good faith, they serve to deny the very access to the judicial system they would claim as justification for their immunity from sanction.

See Daily at 251-251, 265-266.

180. The Supreme Court further explained a Court's authority to sanction parties and attorneys with respect to fraud in *Bowling v. Ansted Chrysler-Plymouth Dodge*, 188 W.Va. 468 (1992). In discussing the awarding of attorneys' fees, the Court stated:

> 'A well established exception to the general rule prohibiting the award of attorney fees in the absence of statutory authorization, allows the assessment of fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . 'Bad faith' may be found in conduct leading to the litigation or in conduct in connection with the litigation . . . Consequently, we conclude that where it can be shown by clear and convincing evidence that a defendant has engaged in fraudulent conduct which has injured a plaintiff, recovery of reasonable attorney's fees may be obtained in addition to the damages sustained as a result of the fraudulent conduct.

See Bowling at 474-475.

181. Finally, the Supreme Court reinforced a Court's authority to sanction a party or its attorneys for fraud in *Pritt v. Suzuki Motor Co. Ltd.*, 204 W.Va. 388 (1998):

> This Court has long-recognized the inherent authority of trial courts to award attorney's fees as a sanction for fraud . . . Based on our

> determination that 'fraud falls within the 'bad faith' exception to the American rule[,]' we concluded . . . that findings of fraud demonstrated by clear and convincing evidence permit attorney's fees to be awarded against a defendant . . . The trial court's award of attorney's fees in this case was based both on violations of specific rules of civil procedure, as well the court's inherent sanctioning power.

See Pritt at 392-393.

182. As discussed exhaustively, *supra*, in this case, Camden-Clark has:

1) Defrauded the Plaintiff, as found by the jury by clear and convincing evidence;

2) Violated multiple court orders, as found by the Court on December 19th, 2005;

3) Made numerous material misrepresentations of fact and law to the PIaintiff and to this Court, both before and during the trial of this matter;

4) Concealed important evidence until the commencement of trial and even in the middle of trial, including the very documents it had been ordered to produce by the Court;

5) Destroyed, concealed or altered material evidence in advance of trial, including cardiac monitor strip times and nurse's notes;

6) Advanced frivolous defenses before the Court; and

7) Wasted countless hours of the Court's time, as well as that of the Plaintiff and his counsel, through all of the above misconduct.

183. Camden-Clark's pre-litigation misconduct, including tampering with the medical record, and fraudulent concealment, was tried and sanctioned by the jury, it need play no part in the relief requested in Plaintiff's motions for sanctions, except as background information and context for Camden-Clark's litigation misconduct. However, the finding of fraudulent concealment by clear and convincing evidence could provide further support for the shifting of fees, pursuant to *Bowling* and *Pritt*, were any such further support required.

184. Camden-Clark's litigation misconduct was not tried to the jury, nor has it yet been sanctioned by the Court.

185. It would be an injustice to allow Camden-Clark's litigation misconduct to go unpunished, simply because it was punished by the jury for its primary misconduct that it attempted to cover up through its litigation misconduct.

186. Camden-Clark's violations of Court Orders, inaccurate answers in discovery, inaccurate testimony and all of its aggregated misconduct before this Court, warrant substantial sanctions.

187. Based on all of the above, the Court concludes that the Plaintiff's Motions should be GRANTED in part. Camden-Clark's litigation misconduct fully justifies the shifting of the Plaintiff's reasonable attorney's fees and expenses to the Defendant. *See e.g. Pritt v. Suzuki Motor Co. Ltd.*, 204 W.Va. 388, 392-93 (1998).[16]

III. Amount of the Attorneys' Fees to the Awarded

188. "[T]he trial [court] . . . is vested with a wide discretion in determining the amount of . . . court costs and counsel fees; and the trial [court's] . . . determination of such matters will not be disturbed upon appeal . . . unless it clearly appears that [it] has abused [its] discretion." Syl. Pt. 3, in part, *Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959).

189. "Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances;

16. This decision is based on this Court's authority pursuant to Rule 37 of the West Virginia Rules of Civil Procedure and this Court's inherent authority to sanction parties and attorneys.

(8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." Syl. Pt. 4, *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).

190. Under West Virginia law, there are no cases aside from those previously cited that guide this Court in determining what a 'reasonable attorney fee' in this case might be.

191. This Court has reviewed the relevant case law and is guided in its determinations by the lodestar analysis described in *Heldreth v. Rahimian*, 219 W.Va. 462, 637 S.E.2d 359 (February 21, 2006) (W.Va. 2006).[17]

192. In *Heldreth*, the Supreme Court of Appeals stated:

> The calculation of reasonable fees must be made pursuant to standards which are well-established for awarding attorney's fees . . .
>
> . . .

---

17. The Court notes that this case involved an analysis of the awarding of attorney fees pursuant to *W.Va. Code* §5-11-13(c), otherwise referred to as a fee-shifting statute. While *Heldreth* is factually distinct from this case and fee-shifting statute analysis does not apply fully to this case, the Court finds the guiding principles of *Heldreth* and the analysis for the awarding of attorney fees pursuant to fee-shifting statutes useful in this case.

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> Reasonable attorneys' fees should be determined by (1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate — the lodestar calculation — and (2) allowing, if appropriate a contingency enhancement. The general factors outlined in Syllabus Point 4 [of] [Aetna] should be considered to determine: (1) the reasonableness of both time expended and hourly rate charged; and (2) the allowance and amount of a contingency enhancement.

Id. at 19

193. The Court finds that several of the *Aetna* factors militate in favor of the Plaintiff:

> a. This case involved 5,650 hours of work by multiple attorneys from two law firms. Given the complex questions of law, both substantive and procedural, raised in this case together with Camden-Clark's litigation misconduct, the Court finds that these hours are not an unreasonable amount of time to expend on this case.
>
> b. This case involved novel and complex questions of law involving fraud, spoliation of evidence, the tort of outrage, medical malpractice, and vicarious liability issues and developed new guidance from the West Virginia Supreme Court in the area of medical

malpractice jurisprudence. Such issues took this case well beyond the realm of ordinary negligence litigation. In addition, the wrongful litigation conduct and discovery abuses of Camden-Clark contributed to the complexity of this case.

c. The Court takes note that Plaintiff's attorneys exercised diligent and persistent skill in determining the facts of this case. While such skills may be routinely expected of ordinary lawyers, this Court takes special note of their skills in achieving a highly substantial, positive jury result for their client in light of Camden-Clark's misconduct.

d. With 5,650 hours placed at risk through the prosecution of this case, the Court is aware that the lawyers involved were significantly precluded from other employment due to acceptance of this case.

e. This case was initially turned down by three litigation law firms prior to Bordas & Bordas agreeing to represent Mr. Boggs. Thus, this case, at the outset, appeared to be undesirable to potential lawyers.

194. The Court notes that Mr. Boggs has received the largest jury verdict remembered in Wood County, West Virginia for the claims that he brought against Camden-Clark. However, his request for attorney's fees

is made pursuant to the litigation misconduct of Camden-Clark during the prosecution of this case. This was not a factor in the jury's determination, nor was the jury instructed on it.

195. Based upon a review of the record and based on *Heldreth*, this Court finds that an appropriate sanction to be assessed against Camden-Clark for its litigation misconduct in this case as described herein is an award of Plaintiff's reasonable attorneys' fees and costs.

196. At the hearing on July 10th, 2006, counsel for the Defendant, Richard Hayhurst testified that he had surveyed area attorneys and that the highest hourly fees being charged in this area were $265 per hour, including by Mr. Hayhurst himself.

197. Attorney James G. Bordas, jr. testified that his firm hires nationally, has a reputation throughout the Ohio Valley of taking and winning difficult cases and compensates its associates competitively with national law firms.

198. Mr. Bordas testified that his firm takes cases on contingent fees, but that were his firm to charge by the hour, attorneys at his firm would charge from $175 per hour to $450 per hour. More specifically, Mr. Bordas testified to a reasonable hourly rate for Mr. Regan and Mr. Brown, actual trial counsel of $300/hr. Other involved members of the firm and hourly rates testified to were: Scott Blass - $350/hr; Jim Bordas - $400/hr; Jamie Bordas

- $300/hr; Linda Bordas- $400/hr; Jason Causey - $200/hr; Chris Heller -$150; Jay Stoneking-$300; and Bob Gaudis -$150/hr.

199. The best evidence before the Court by affidavit filed is that trial counsel Brown and Regan expended a combined total of 1,555.95 hours. Other members of the Bordas firm spent the following number of hours on this case: Scott Blass — 20; Jim Bordas - 60; Jamie Bordas — 15; Linda Bordas — 10; Jason Causey — 10; Chris Heller — 10; Jay Stoneking — 15; and Bob Gaudis — 10.

200. Applying the time spent by each member of the Bordas firm to each attorneys hourly rate results in a reasonable attorney fee for the firm of Bordas & Bordas of $515,785.00.

201. Christopher Rinehart kept contemporaneous billing records for the period between March, 2003 and the time of the filing of the motion when he was employed at the law firm of Carlile, Patchen, and Murphy. These hours totaled 2,051.10 for that period of time. Based upon those records the Court considering all the factors set forth above that $175/hr was a reasonable fee to be charged by Mr. Rinehart. Prior to joining the law firm, Mr. Rinehart worked on this case extensively from October 2001 through March 2003. Mr. Rinehart has made a conservative estimate of 1,893 hours expended in this matter during this period of time. The Court finds the best evidence as to Mr. Rinehart's hours expended on this case is a total of 3,944.10 hours. Applying an

hourly rate of $175/hr to 3,944.10 produces a reasonable attorney fee for Mr. Rinehart and his firm of $690, 217.50.

202. The Plaintiff has calculated a legal fee which includes a 2.0 contingency enhancement totaling $2,994,500.00. However, the Plaintiff requests his actual contractual contingency fee, plus expenses in the total amount of $2,888,978.24. The Court declines to award the requested amount. The Court is of the opinion that given all the facts and circumstances of the case including, but not limited to, the sizeable jury verdict returned that an award of attorney fees based upon the actual hours expended multiplied by a reasonable hourly rate plus all litigation expenses and costs is far and just compensation to the Plaintiff.

203. Plaintiff has documented expenses in the amount of $153,238.52, not an unreasonable amount in a case that required Plaintiff to retain five different experts and to travel across the country on more than one occasion for the over two dozen depositions in the case and which case consumed two full weeks of trial at a location distant from Plaintiff's counsel's homes.

204. Based on the foregoing, this Court hereby awards expenses to Plaintiff in the amount of $153,238.52.

IT IS THEREFORE ORDERED THAT the Plaintiff attorney's fees and expenses expended in this matter should be AWARDED TO THE PLAINTIFF as a SANCTION for litigation misconduct in this case committed by Camden-Clark. The amount to be awarded

to the Plaintiff and paid by Camden-Clark includes expenses of $153,238.52 and attorneys' fees of $1,206,002.50 for a total amount of $1,359,241.02, with interest to run at the Judgment Rate from the date of this Court's Order on this Motion, until such time as the Defendant discharges its obligation by paying the fees owed the Plaintiff.

IT IS SO ORDERED, THIS 24th DAY of May, 2007.

s/ Robert A. Waters
Robert A. Waters
4th Judicial Circuit Judge

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA DATED OCTOBER 26, 2006

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

BERNARD BOGGS, as administrator of the Estate of HILDA BOGGS, deceased, as personal Representative of the statutory beneficiaries of the Wrongful death claim herein asserted and in his Own right,

Plaintiffs,

v.

CAMDEN-CLARK MEMORIAL HOSPITAL,

Defendant.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT, CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION'S ("CAMDEN-CLARK'S") MOTIONS FOR A NEW TRIAL AND TO ALTER OR AMEND THE JUDGMENT ORDER

CAME THE PARTIES, before the Court, pursuant to a prior Order of this Court, by their respective counsel, Christopher J. Regan and Christopher A. Rinehart for the Plaintiff and Richard A. Hayhurst for the Defendant, to be heard on the Defendant's Motion for a New Trial, First Amended Motion for a New Trial, Motion to Alter

or Amend the Judgment Order, and First Amended Motion to Alter or Amend the Judgment Order ("Post-Trial Motions").

WHEREUPON, the Court heard oral argument of counsel.

WHEREUPON, the Court was of the opinion that the Defendant's Post-Trial Motions should be DENIED in their entirety, for the reasons appearing of record and as stated herein.

FACTUAL BACKGROUND

1. Mrs. Boggs' widower, Bernard R. "Ray" Boggs ("Mr. Boggs") filed the instant suit alleging, *inter alia*, medical negligence, vicarious liability, fraudulent concealment, spoliation of evidence, and intentional infliction of emotional distress.

2. Following a two-week trial in this matter, the Defendant was found liable to the Plaintiff on a variety of tort theories for a total of $6,545,000.00.

3. This Court entered signed a Judgment Order which was entered by the Circuit Clerk of Wood County ("Clerk") on April 28, 2006 ("Judgment").

4. The Judgment reduced the verdict by the amount of a prior settlement with Dr. Koyawala. *See* Judgment Order in 03-C-296.

5. On May 16, 2006, Defendant filed a Motion for New Trial and a Motion to Alter or Amend the Judgment Order with the Wood County Circuit Court.

6. On May 17, 2006, Defendant filed a First Amended Motion for New Trial and a First Amended Motion to Alter or Amend the Judgment Order with the Wood County Circuit Court.[1]

7. Also on May 17, 2006, Defendant served a Notice of Hearing on Plaintiff regarding its First Amended Motion for New Trial and its First Amended Motion to Alter or Amend the Judgment Order. Such hearing was to take place on July 10, 2006.

8. On June 12, 2006, Defendant filed a Motion to reschedule the hearing set for July 10, 2006, due to the unavailability of transcripts.

9. At a hearing conducted on July 10, 2006, the parties agreed to reschedule the hearing on Defendant's

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1. The Court notes that the Defendant stated in its Motions to Alter or Amend the Judgment Order that it was filing such request pursuant to Rule 59(b) of the West Virginia Rules of Civil Procedure. Rule 59(b) does not permit this Court to alter or amend a judgment order. Since Defendant requested, in its Motions, that this Court alter or amend the judgment order entered in this case for the reasons stated in its Motions, this Court has construed its Motions to Alter or Amend as Motions made pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, or, in the alternative, pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure.

Post-Trial Motions. The hearing was re-set for August 24th, 2006.

10. Also at the hearing conducted on July 10, 2006, and in addition to agreeing to reschedule the hearing on the Post-Trial Motions, the parties agreed to a revised briefing schedule related to memoranda in support of and in opposition to the Post-Trial Motions. Defendant agreed to provide a memorandum in support of its Post-Trial Motions by August 10, 2006, and received permission from the Court to file a memorandum up to one hundred (100) pages. Plaintiff agreed to provide a memorandum in opposition to Defendant's Post-Trial Motions by August 17, 2006.

11. On August 10, 2006, Defendant failed to provide its memorandum in support of its Post-Trial Motions.

12. On or about August 9, 2006, Camden-Clark moved to continue the hearing set for August 24, 2006. The Court set that motion for hearing immediately prior to the hearing on Defendant's Post-Trial Motions on August 24, 2006.

13. On August 17, 2006, Plaintiff filed his Memoranda in Opposition to Defendant's Post-Trial Motions.

14. On August 24, 2006, the parties appeared by counsel for the Court for the previously scheduled hearing on Defendant's Post-Trial Motions. The

Defendant's Motion to Continue the hearing was denied. *See* Order Denying Defendant's Motion for a Continuance.

ANALYSIS AND CONCLUSIONS OF LAW

I. TIMELINESS OF DEFENDANT'S POST-TRIAL MOTIONS

15. Rule 59(b) of the West Virginia Rules of Civil Procedure states as follows:

> Any motion for a new trial shall be filed not later than 10 days after the entry of judgment.

Id.

16. Rule 59(e) of the West Virginia Rules of Civil Procedure states as follows:

> Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

Id.

17. Rule 50(b) of the West Virginia Rules of Civil Procedure states, in pertinent part, as follows:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the

> legal questions raised by the motion. The movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment ...

Id.

18. Rule 5(e) of the West Virginia Rules of Civil Procedure defines 'filing' for purposes of the West Virginia Rules of Civil Procedure and states:

> The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, who shall note thereon the filing date . . . *the notation by the clerk . . . of the filing date on any such paper constitutes the filing of such paper*, and such paper then becomes a part of the record in the action without any order of the court.

Id. (emphasis supplied).

19. Rule 6(b) of the West Virginia Rules of Civil Procedure states:

> When by these rules of by a notice given thereunder or by order of the court an act is required or allowed to done at or within a specified time, all the parties to the action, by written stipulation filed with the court, may agree at any time to a different period, or the court of cause shown may at any time in its

> discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; *but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.*

Id. (emphasis supplied).

20. Rules 50(b) and 59(b) and (e) provide no mechanism under their terms for the extension of time to file the motions addressed under each rule. In this case, the Court entered judgment on April 28, 2006. Defendant filed its motions on May 16 and 17, 2006. For this reason Defendant's Post-Trial Motions were untimely and must be denied.[2]

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2. *Roberts, infra,* counts only calendar days in determining when the deadline is to file motions under Rule 50 and 59. Under this analysis, Defendant would have been required to file its motions by May 8, 2006. However, under a more lenient standard of judicial days, Camden-Clark still missed the ten (10) day deadline. The ten (10) judicial days following April the 28, 2006, when the judgment order was filed, were May 1st, 2nd, 3rd, 4th, 5th, 8th, 10th, 11th, 12th and the 15th. The Post-Trial Motions would, under the more lenient standard, be due on or before May 15, 2006. Because they were not filed until the 16th at the earliest, the Motions were defaulted under both possible standards.

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21. The West Virginia Supreme Court of Appeals has upheld the strict timeline standards established in Rules 50(b), 59(b) and 59(e), especially as those time lines are limited by Rule 6(b). In discussing how these rules apply, the Supreme Court of Appeals stated

> Following the conclusion of the jury trial underlying the instant appeal, the circuit court entered its judgment order upholding the jury's verdict on September 16, 1998. Pursuant to Rule 59(b) of the West Virginia Rules of Civil Procedure, a motion for a new trial must be filed within ten days of the entry of the judgment . . . . This filing period has been declared to be mandatory and unalterable by the presiding circuit court. *See* W. Va. R. Civ. P. 6(b). In other words, the requirement of Rule 59(b) of the Rules of Civil Procedure that a motion for a new trial shall be served not later than ten days after entry of the judgment is mandatory and jurisdictional. The time required for service of such a motion cannot be extended by the court or by the parties. Syl. pt. 1, *Boggs v. Settle, 150 W. Va. 330, 145 S.E.2d 446 (1965). See also* Syl. pt. 3, *Miller v. Triplett, 203 W. Va. 351, 507 S.E.2d 714 (1998) . . . Thus, Roberts' motion for a new trial should have been filed by September 28, 1998.*

Roberts v. Consolidation Coal Co., 208 W.Va. 218, 225-226; 539 S.E.2d 478, 486-487 (2000) (footnotes, internal

cites omitted) ("As this Court noted, the judgment order was entered on September 16, 1998, and the motion for new trial pursuant to Rule 59(b) should have been filed by, no later than, September 28, 1998. The tenth day after entry of the judgment order fell on a Saturday in September of 1998. Therefore, the next business day upon which the motion could have been filed would have been Monday, September 28, 1998, the deadline established in the Court's opinion").

22. In addition to *Roberts*, the Supreme Court of Appeals has upheld the strict time limitations in Rules 50(b) and/or 59(b) in other cases. *See, e.g., Sothen v. Continental Assurance Co.*, 147 W.Va. 458, 128 S.E.2d 458 (1962); *Boggs v. Settle*, 150 W.Va. 330, 145 S.E.2d 446 (1965); *State v. Legg*, 151 W.Va. 401, 151 S.E.2d 215 (1966); *Miller v. Triplett*, 203 W.Va. 351, 507 S.E.2d 714 (1998).

23. Camden-Clark attempted to question the date of the Judgment's entry in a pleading filed on August 23, 2006. However, the Court noted that the Judgment Order bore the stamp of the clerk on its face, indicating it was entered on April 28, 2006. The Judgment Order was also certified by the Clerk on its last page as having been entered on April 28, 2006. Furthermore, the docket of the Clerk indicated that the Judgment Order was entered on April 28, 2006.

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24. Rule 58 of the West Virginia Rules of Civil Procedure states:

> The clerk, forthwith upon receipt of the signed judgment, shall enter it in the civil docket as provided by Rule 79(a). The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of judgment shall not be delayed for the taxing of costs or to permit a motion for a new trial or any other motion permitted by these rules."

Id. Therefore, the Clerk's docket controls and it clearly indicates that the Judgment Order in this case was entered on April 28, 2006.

25. Additionally, Camden-Clark filed multiple pleadings after the entry of Judgment in this case stating that the Judgment Order was entered on April 28, 2006, as well as an appellate transcript request stating that the date Judgment was entered was April 28, 2006.

26. An affidavit signed by a deputy clerk, executed one (1) day before the hearing on these issues (August 24, 2006) and approximately four (4) months after the Judgment Order was entered and drafted by counsel for the Defendant, calling into question the date of Judgment in this case, without any other supportive evidence or documentation, is not sufficient to overcome the official records of this Court and the Clerk that

clearly state the date Judgment was entered on April 28, 2006.[3]

27. Accordingly, the Court FINDS as a FACT that Judgment in this matter was entered on April 28, 2006, and that Camden-Clark's Post-Trial Motions were filed outside the mandatory and jurisdictional ten (10) day deadline. As a result, the Post-Trial Motions must be and are DENIED. *See Roberts v. Consolidation Coal Co.*, 208 W.Va. 218, 225-226; 539 S.E.2d 478, 486-487 (2000); *Boggs v. Settle*, 150 W.Va. 330, 145 S.E.2d 446 (1965).[4]

II. MERITS OF DEFENDANT'S POST-TRIAL MOTIONS

28. The Court recognizes the weighty matters in dispute between the parties and the importance of a complete record for purposes of any appeal. Therefore, as an alternative basis for its decision, the Court makes the following rulings as to the merits of the Defendant's Post-trial Motions:

---

3. The Affidavit in question together with the arguments of Defendant's counsel in the hearing of August 24, 2006, also called into question all records officially entered by the Clerk and by all county clerks in the state of West Virginia. In effect, Camden-Clark claims that its affidavit was correct and every court record was wrong.

4. (missing footnote)

Appendix C

A. Defendant's Motion to Alter or Amend the Judgment Order and First Amended Motion to Alter or Amend the Judgment Order

29. As an initial matter, the Court notes that Camden-Clark had already raised most, if not all of the issues raised in its Motions to Alter or Amend the Judgment Order, in connection with the Court's consideration of the form of the Judgment Order in April of 2006.

30. At that time, both parties submitted competing Judgment Orders along with argument and a hearing was held. The Court and its staff conducted substantial research at that time and determined that the Plaintiff 's proposed order was the proper order.

31. Based upon the record entered therein, the Court re-affirms its decision to enter Judgment in the manner it determined to be proper in April, 2006.

32. In addition to the foregoing, the Court makes the following findings and legal conclusions:

(1) Punitive Damages

33. The Court has examined the punitive damage award in this case and finds it to be proper having considered all the factors commended to the Court's consideration in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656 (1992).

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34. Specifically, the Court instructed the jury in accordance with Syllabus Point 3 of *Garnes*, as requested by both the Plaintiff and the Defendant.

35. In reviewing the award of punitive damages, the Court considered the factors enumerated in Syllabus Points 3 and 4 of *Garnes* and, as stated in the hearing of August 24, 2006, finds the punitive damages awarded reasonable and should not be modified.

36. Specifically, as to the considerations enumerated in Syllabus Point 3 of *Garnes*, after reviewing the entire record and arguments of counsel related to the same, the Court finds as follows:

(1) The punitive damages bear a reasonable relationship to the harm that is likely to occur from the Defendant's conduct as well as to the harm that actually has occurred. Because Defendant's actions in this case caused grievous harm, in the form of the death of Plaintiff's wife and the severe emotional distress suffered by Plaintiff, and could cause the same harm in the future, the punitive damages awarded should be, and are, greater.

(2) The jury was instructed on consideration of the reprehensibility of the Defendant's conduct in this case. In reviewing this matter, the Court notes that there was evidence presented as to the length of

Defendant's actions over a period of years, that the Defendant was aware that its actions was causing or would likely have caused harm to the Plaintiff, and that Defendant attempted to, or in fact did, conceal its actions or the harm caused by them. There was no evidence presented to the jury on the issues of Defendant's past wrongful conduct or issues regarding settlement, and this Court is not aware of significant information on either issue that reasonably supports either party.

(3) The jury was not presented any issues regarding the Defendant profiting from its wrongful conduct, and this Court is unaware of any such profit. As a result, this factor bears no relationship to the analysis of the appropriateness of the punitive damage award.

(4) The punitive damages awarded by the jury bear a reasonable relationship to the compensatory damages awarded by the jury.

Syllabus Point 6 of *Boyd v. Gaffoli*, 216 W.Va.552, 608 S.E.2d 169 (2004) states:

The outer limit of the ratio of punitive damages to compensatory damages in

cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional [citations omitted].

In this case, the jury determined that the Defendant acted negligently or with wanton disregard *and* with actual intention to cause harm. In light of these findings and the guidance provided by *Boyd*, the Court finds that the ratio of punitive damages to compensatory damages in the amount of 2.2:1 is reasonable.

(5) The Defendant is a significant institution in the City of Parkersburg, West Virginia, and can, based upon express representations made by counsel for the Defendant at the hearing on August 24, 2006, bear the cost of the damages awarded by the jury.

37. Camden-Clark asserts that the Judgment Order holds Camden-Clark responsible for the punitive damages awarded against Dr. Koyawala and Evelyn

Melvin. This assertion is without merit since the Court extinguished the punitive award against Dr. Koyawala and Melvin by offsetting the prior settlement with Dr. Koyawala and United Anesthesia, Inc., against the damages assessed to Dr. Koyawala and Evelyn Melvin. As a result of the offset, Camden-Clark is not required to pay any part of the punitive damages assessed to Dr. Koyawala and Evelyn Melvin.

38. However, in the event that no offset had occurred, Camden-Clark would have been held responsible for the punitive damage award assessed to Dr. Koyawala and Evelyn Melvin based upon ratification of their acts.

39. "[A] master is liable for compensatory damages, in any event, for the negligent performance of an act by his servant, done within the scope of his employment and in furtherance of his master's business, and he is also liable for exemplary damages, if the negligence is such that the servant himself would be liable therefor, and the master has either authorized it before it was done or ratified it afterwards." *Hains v. Parkersburg, M. & I. Ry. Co.*, 75 W.Va. 613 (1915).[5]

40. In this case the un-contradicted evidence of record demonstrates that Camden-Clark authorized and ratified the conduct of Dr. Koyawala and/or Evelyn

5. In this case, the jury specifically determined that Dr. Koyawala and/or Evelyn Melvin were the ostensible agents of Camden-Clark.

Melvin. First, Camden-Clark authorized Dr. Koyawala's and Evelyn Melvin's actions in knowingly allowing practitioners, in violation of its corporate policy, to conduct anesthesia without the audible monitoring alarms being set and on. Second, even after the death of Mrs. Boggs, Camden-Clark made no changes to its policies that specifically require monitor alarms to be turned on during surgery to actually insure that its practitioners are in compliance with the policy. Third, Camden-Clark claimed that Dr. Koyawala's actions were in compliance with Camden-Clark's policies and within the standard of care, including retaining experts to state that their conduct was proper under Hospital policies and rules. Fourth, Camden-Clark maintained Evelyn Melvin and Dr. Koyawala on their staffs, with no apparent restrictions or actions taken in regard to Mrs. Boggs' case, until each left, for reasons unrelated to Mrs. Boggs' case, in late 2001 and November of 2003, respectively.

41. Because Camden-Clark ratified its agents' conduct, Camden-Clark would be liable for the punitive damages assessed against its agents pursuant to *Hains*. However, since the prior settlement extinguished the punitive award against Koyawala, *Hains* need not be applied.

42. The Court further finds that the Judgment Order correctly applied the offset from the prior settlement to the total damages awarded pursuant to *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990). *Zando* clearly provides that the offset applies to the total

damages suffered by the Plaintiff in order to prevent a double recovery of damages. This is the manner in which the Court applied the offset in this ease. *See* Judgment Order.

43. The Court rejects Camden-Clark's assertions that *Burgess v. Porterfield*, 196 W.Va. 178 (1996) requires a different application of the prior settlement offset than was applied by this Court in this case. As *Burgess* states:

> We hold, therefore, that defendants in a civil action against whom awards of compensatory and punitive damages are rendered are entitled to a reduction of the compensatory damage award, but not the punitive damage award, by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties.

Id. at 185. Based on this language, a party cannot set off *its own* punitive damage liability through a settlement paid by another. Thus, in this case, the assessment of punitive damages against Camden-Clark was not reduced by the prior settlement with Dr. Koyawala. However, those damages assessed to Dr. Koyawala and/or United Anesthesia, Inc., through Evelyn Melvin, were reduced, and, in the case of punitive damages, eliminated, by the offset applied by this Court.[6]

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6. The Court further notes that Camden-Clark specifically requested that the punitive damage component of the jury verdict form be bifurcated so that separate awards be assessed to Dr. Koyawala and Evelyn Melvin as well as to Camden-Clark.

Appendix C

(3) Damages for Intentional Infliction of Emotional Distress

44. Camden-Clark's assertion that the jury's verdict on Plaintiff 's intentional infliction of emotional distress claim was duplicative of the punitive award, pursuant to *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278 (1994), is also without merit. Pursuant to *Tudor v. Charleston Area Medical Center, Inc.*, 203 W.Va. 111 (1997), the double-recovery analysis of *Dzinglski* is not performed where the Plaintiff presents evidence of emotional injury, including depression.

> Where, however, the jury is presented with substantial and concrete evidence of a plaintiff's serious physical, emotional or psychiatric injury arising out of the intentional infliction of emotional distress, *i.e.* treatment for physical problems, depression, anxiety, or other emotional or mental problems, then any compensatory or special damages awarded would be in the nature of compensation to the injured plaintiff(s) for actual injury, rather than serving the function of punishing the defendant(s) and deterring such future conduct, a punitive damage award in such cases would not constitute an impermissible double recovery. To the extent that this holding conflicts with our decision in *Dzinglski v. Weirton Steel Corp*, 191 W.Va. 278, 445 S.E.2d 219 (1994), it is hereby modified.

Id. at Syl. Pt. 14.

45. In this case, the Plaintiff presented un-contradicted and uncontested evidence of depression for which he was treated medically. Thus, the *Dzinglski* analysis does not apply.

46. Even if the *Dzinglski* analysis did apply, the Court finds that given the size of the compensatory award for intentional infliction compared to the size of the punitive award, the jury intended the compensatory award to be just that, and utilized the punitive award to punish Camden-Clark for its conduct against Mr. Boggs.

(4) Miscellaneous

47. The rest and residue of the Defendant's Motions to Alter or Amend the Judgment Order are denied for the reasons already appearing of record, and for the reasons stated in the Plaintiff's Memorandum in Opposition thereto. *See* Plaintiff, Bernard Boggs' Memorandum in Opposition to Defendant's First Amended Motion to Alter or Amend Judgment Order, filed on August 17, 2006.

B. Defendant's Motion for New Trial and First Amended Motion for New Trial

48. With regard to Defendant's Motions for A New Trial, the Court finds as follows:

49. At tne hearing of August 24, 2006, Camden-Clark submitted the issues raised in its Motions for New Trial based upon the filings made as of that date and elected

not to provide additional argument in support of its Motions at the hearing of August 24, 2006. The Court notes that no information, other than the Motions themselves, were ever submitted to the Court in supported of Defendant's new trial motions.

50. To the extent that the issues raised in Defendant's Motion to Alter or Amend the Judgment Order or First Amended Motion to Alter or Amend the Judgment Order are raised in its Motions for New Trial, they are denied for the reasons stated above.

51. The Court hereby finds that each error asserted in Defendant's Motions for a New Trial was either (1) argued before the Court at trial, in which case the Court affirms its prior decision for the reasons given at the time, or (2) was not raised at all, in which case it is waived.

52. The Court hereby FINDS that the brief in Opposition to the Defendant's Motions for a New Trial accurately sets forth the relevant circumstances as to each error assigned and the recollection of counsel reflected therein comported with the recollection of the Court.

53. Accordingly, the Motions for a New Trial are DENIED, as to every error asserted, (i) for the reasons appearing of record and (ii) for the reasons given in Plaintiff's Memorandum in Opposition. *See* Plaintiff Bernard Boggs' Memorandum in Opposition to Defendant's First Amended Motion for a New Trial, filed on August 17, 2006.

Appendix C

C. Defendant's Rule 60(b) Motions

54. To the extent the untimely Post-Trial Motions would be considered Rule 60(b) motions, they are also DENIED, as they fail to present any meritorious issue under Rule 60(b), for the reasons stated herein.

CONCLUSION

WHEREFORE, this Court HOLDS, ADJUDGES AND DECREES that the Defendant, Camden-Clark Memorial Hospital's Motion to Alter or Amend the Judgment and First Amended Motion to Alter or Amend the Judgment and Motion for a New Trial and First Amended Motion for a New Trial are in all respects DENIED because:

1) The motions were not timely filed and are therefore forfeited pursuant to the law of *Roberts* and *Boggs v. Settle, supra.*

2) Even had the motions been timely, they are without substantive merit, whether considered under Rules 50 and 59 or Rule 60(b).

Execution of the Judgment in this matter shall be stayed, pursuant to Rule 62(i), until and including October 30th, 2006, the date this Court has set as the last day for the filing of a Petition for Appeal in this case.

Appendix C

ALL OF THE ABOVE IS SO ORDERED, this 26th day of October, 2006.

s/ Robert A. Waters
Robert A. Waters, Circuit Judge